

2007

## Envisioning the Constitution

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### Recommended Citation

Crocker, Thomas P. "Envisioning the Constitution." American University Law Review 57, no.1 (October 2007): 1-71.

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# Envisioning the Constitution

## **Abstract**

If one of the more persistent problems of constitutional interpretation, particularly of the Bill of Rights, is that we lack a clear view of it, then it would appear that how we see the Constitution is as important as how we read it. What clauses we see as connected in order to form comprehensive values, such as federalism or rights protections, are not so much products of constitutional interpretation as constitutional vision. To obtain a view of the Constitution, we have to do more than derive semantic meaning from diverse articles and clauses. To have a vision of the Constitution is to have a general attitude of attending to particular matters rather than others, of connecting these matters to others in particular ways, and of making decisions based on seeing the matters in a specific light. Vision is the mechanism and metaphor through which attention is focused on particular constitutional matters. By envisioning the Constitution, one illuminates overall structures as well as particular meanings. For example, the meaning of the Equal Protection Clause is generally not determined by an interpretation of the clause's text or an "interpretation" of the Fourteenth Amendment, but rather by the way in which the Supreme Court is willing to look at a problem arising under the Equal Protection Clause - that is, what level of scrutiny is applied to the issue. Moreover, changed or competing visions drive substantive changes in the law. The thesis of this Article is that vision, by shaping the grounds for interpretation, is essential to constitutional law and legal theory.

## **Keywords**

Constitutional Law, Interpretation, Equal Protection, Legal theory

## ARTICLES

### ENVISIONING THE CONSTITUTION

THOMAS P. CROCKER\*

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If one of the more persistent problems of constitutional interpretation, particularly of the Bill of Rights, is that “we lack a clear view of it,”<sup>1</sup> then it would appear that how we see the Constitution is as important as how we read it. What clauses we see as connected in order to form comprehensive values, such as federalism

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1. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xi (1998) [hereinafter AMAR, *THE BILL OF RIGHTS*].

or rights protections, are not so much products of constitutional interpretation as constitutional vision. To obtain a view of the Constitution, we have to do more than derive semantic meaning from diverse articles and clauses. To have a vision of the Constitution is to have a general attitude of attending to particular matters rather than others, of connecting these matters to others in particular ways, and of making decisions based on seeing the matters in a specific light. By envisioning the Constitution, one illuminates overall structures as well as particular meanings. The thesis of this Article is that vision, by shaping the grounds for interpretation, is essential to constitutional law and legal theory.

Recent constitutional “revolutions” driven by federalism concerns have transformed Commerce Clause, Fourteenth Amendment, and Tenth Amendment jurisprudence. These transformations occur not only on the basis of new interpretations of old text, but also on the basis of new visions of constitutional design, purpose, and effect. Moreover, new constitutional jurisprudence enables new ways of seeing and inhabiting broader constitutional culture. How one views constitutional structure and purpose makes possible particular ways of seeing institutional relations and powers as well as specific rights and duties. Much has been written on the problems and mechanics of constitutional interpretation, but little consideration has been given to the dynamics of constitutional vision.

At times, however, judicial vision takes center stage. When judicial nominees appear before Senate confirmation hearings, Senators want more than anything to get a picture of the nominee’s judicial outlook. Knowing they cannot get specific thoughts about particular constitutional issues that might come before the court, they nonetheless scrutinize the nominee’s views on particular aspects of legal doctrine and practice.<sup>2</sup> Since how a judge or Justice sees an issue is central to both framing and resolving it, a nominating President, as well as an expectant public, believe that the nominee’s vision is vital to the future of the Constitution and the culture it serves and creates.<sup>3</sup> As Justice Breyer has noted, “Supreme Court work leads the Justice to develop a view of the Constitution as a

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2. See Jeffrey Rosen, *Senators Should Focus on Roberts’ Vision*, CHI. SUN-TIMES, July 22, 2005, at 59 (“[T]he Senate should explore Judge Roberts’s judicial philosophy and temperament . . . [and] his vision of the role of the courts in democracy.”).

3. “A President nominates a candidate to become a Justice because the President believes that the constitutional vision of the nominee is good for the country.” Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 40 (2006).

whole.”<sup>4</sup> How a Justice envisions the Constitution as a whole matters, making the politics surrounding nominations especially vexed. Indeed, Ronald Dworkin claims that what was at stake in Robert Bork’s failed nomination was his “jurisprudence—his vision of what the rule of law requires . . . .”<sup>5</sup>

Vision is the mechanism and metaphor through which attention is focused on particular constitutional matters. A judge or Justice’s organizing vision, which provides a narrative account of particular provisions, and contributes to broader conversations of constitutional culture, can dramatically shape how we live.<sup>6</sup> For example, the meaning of the Equal Protection Clause is generally not determined by an interpretation of the clause’s text<sup>7</sup> or an “interpretation” of the Fourteenth Amendment, but rather by the way in which the Supreme Court is willing to look at a problem arising under the Equal Protection Clause. In an equal protection challenge, if government action receives strict scrutiny it is less likely to be upheld than if it receives rational basis review.<sup>8</sup> Levels of scrutiny guide not only how the Justices see the specific challenge before the Court, but also how they see the challenge within a broader constitutional context. Thus, the question in equal protection is not so much the difference between originalism, textualism, or pragmatism as methods of interpreting constitutional text, as it is a prior question of scrutiny.

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4. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005).

5. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 283 (1996).

6. Writing in particular about relations to past legal cultures, Bruce Ackerman observes, “the way judges construct the American relationship to the deep past is not a matter that any of us can take lightly: the things that they allow themselves to see control, sometimes dramatically, what all of us can do in the here and now.” 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 38 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*].

7. “[N]or deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

8. Despite Justice O’Connor’s desire “to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact,’” that old saw still has plenty of teeth. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (O’Connor, J.). “[B]etween 1990 and 2003, the Supreme Court only applied strict scrutiny 12 times, upholding only a single law prior to 2002.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006); see, e.g., *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995) (invalidating Georgia redistricting plan as violating equal protection under strict scrutiny analysis); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993) (invalidating under strict scrutiny a city ordinance that prohibited animal sacrifice for ritualistic purposes as an interference with free exercise of religion); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (invalidating city ordinance which gave preference for construction contracts to minority-owned construction companies as violating equal protection under strict scrutiny).

Changed or competing visions drive substantive changes in the law; moreover, in the context of constitutional law, “[t]he fight over the Constitution is a fight over contrasting political visions . . . .”<sup>9</sup> Think here of the change in vision between the *Lochner*-era understanding of constitutional culture, which foreclosed many attempts at national legislation aimed at economic regulation, and the post-New Deal approach, which permits not only certain forms of economic regulation, but also allows for a national right to a minimum level of social security.<sup>10</sup> These are two very broad visions of the Constitution that are largely incompatible. The transformation from one way of seeing to the other occurred through the adoption of one vision of constitutional structure and purpose over the other.<sup>11</sup> If this observation concerning momentous constitutional change is right, then constitutional meaning is not derived solely from text, or other modalities of constitutional interpretation, but initially from more comprehensive visions of the Constitution in context.

Supreme Court decisions are sprinkled with references to the Framers’ “vision” of the Constitution and its institutions,<sup>12</sup> the majority’s (or dissent’s) “vision” of the law or an issue,<sup>13</sup> and

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9. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1090 (2001).

10. On the process of this transformation, see generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

11. Compare *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (concluding that Congress’s attempt to prevent interstate commerce of child labor products was an improper exercise of its power under the Commerce Clause), with *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (determining that Congress acted within its Commerce Clause authority by limiting the acreage that farmers could dedicate to wheat production). Note that such changes are never fully settled, but are open to new interpretations. See, e.g., *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (“In my ‘revisionist’ view . . . the Federal Government’s authority under the Commerce Clause . . . does not extend to the regulation of wholly intra state, point-of-sale transactions.”); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s authority under the Commerce Clause).

12. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States.”); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm . . . . This is at the heart of Lincoln’s vision of ‘government of the people, by the people, [and] for the people.’”); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (Jackson, J.) (“Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.”).

13. See, e.g., *United States v. Booker*, 543 U.S. 220, 284 (2005) (Stevens, J., dissenting in part) (“If Congress wished to amend the statute to enact the majority’s vision of how the Guidelines should operate, it would be perfectly free to do so.”); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 (2000) (Stevens, J., dissenting) (“It

Congress's "vision" in enacting a law.<sup>14</sup> Moreover, the Court regularly frames its own institutional capacity in terms of directing its vision or turning a blind eye to a legal matter. Considering the scope of liberty in matters of family life, for example, the Court states that it cannot avoid concluding that the rights associated with the family are fundamental "unless we close our eyes" to the reasons supporting precedents.<sup>15</sup> In closely divided federalism cases, the majority claims that "[i]n putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers . . ."<sup>16</sup> In each of these references to vision, something more than a clause-bound interpretation of the Constitution is at stake. To speak of a vision of the Constitution is to call attention to how legal texts and their interpretations fit within broader legal and cultural contexts that simultaneously shape and are shaped by further interpretive articulations.

Indeed, the imagery of vision is often employed in internecine comments between the majority and dissent. For example, the dissent in *Grutter v. Bollinger*<sup>17</sup> accuses the majority of being "willfully blind to the very real experience in California and elsewhere" of attracting students without affirmative action programs.<sup>18</sup> And the dissent in *Michael H. v. Gerald D.*<sup>19</sup> accuses the plurality of turning "a blind eye to the true nature" of the underlying statute.<sup>20</sup> Thus, the importance of vision in the law is underscored by the equal importance of blindness in the law, which like vision, can be selectively deployed to alter interpretive outcomes.

Scholars and critics also regularly frame problems with and approaches to constitutional interpretation in terms of vision. Akhil Amar frames his project in his comprehensive account of the Bill of Rights in terms of vision: "[O]nly after we understand their world and their original vision can we begin to assess, in a self-conscious

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is not this Court's constitutional function to choose between the competing visions of what makes democracy work . . ."); *Clinton v. City of New York*, 524 U.S. 417, 472 (1998) (Breyer, J., dissenting) (quoting Chief Justice Marshall for the "genius of the Framers' pragmatic vision").

14. "Congress' vision was that public broadcasting would be a forum for the educational, cultural, and public affairs broadcasting which commercial stations had been unable or unwilling to furnish. In order to further that vision, in 1967 Congress passed the Public Broadcasting Act of 1967 . . ." *FCC v. League of Women Voters*, 468 U.S. 364, 404 (1984) (Rehnquist, J., dissenting).

15. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977).

16. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 (1996).

17. 539 U.S. 306 (2003).

18. *Id.* at 367 (Thomas, J., dissenting in part and concurring in part).

19. 491 U.S. 110 (1989).

20. *Id.* at 151 (Brennan, J., dissenting).

and systemic way, how much of this vision, if any, has survived—or should survive—subsequent constitutional developments.”<sup>21</sup> Elsewhere, Amar writes of the “geostrategic vision of union distilled in the Preamble.”<sup>22</sup> Bruce Ackerman argues for a particular way of seeing the transition from the *Lochner*-era vision of the Constitution to the “particular vision of social life elaborated by the New Deal.”<sup>23</sup> More generally, writing about the system of law articulated through narrative, Robert Cover writes that “[a] *nomos* is a present world constituted by a system of tension between reality and vision . . . [in which] law gives a vision depth of field . . . .”<sup>24</sup>

Vision creates the legal worlds we inhabit. Sometimes we view the Constitution as a whole, articulating its meaning in terms of history, structure and purpose. Sometimes we view the Constitution in its component parts, focusing on the meaning of a particular provision in relation to a particular problem. Through these ways of seeing the Constitution, judges and scholars participate in the process of creating constitutional meaning. But vision is also implicated in the more mundane and ordinary ways in which we view social facts. How courts see facts and the social contexts in which they arise have substantive outcomes. There are of course subtle and meaningful implications for failing to see important facts in the world that are different than the implications for failing to see alternate meanings of the Constitution, but these different implications are less important than the similarities between the situations in which the work of vision matters.

A persistent problem of constitutional interpretation is the seeming indeterminacy of the text. Multiple meanings are almost always possible. One promising way to resolve multiplicity is through methodology. Under formalist approaches, we derive constitutional meaning from interpretive method. According to critics, especially legal realists and Critical Legal Studies (“CLS”) scholars, formal methodology alone is incapable of dispelling indeterminacy.<sup>25</sup> Thus,

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21. AMAR, *THE BILL OF RIGHTS*, *supra* note 1, at 7-8.

22. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 106 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*].

23. ACKERMAN, *TRANSFORMATIONS*, *supra* note 10, at 380.

24. Rober M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983) [hereinafter Cover, *Nomos and Narrative*].

25. Formalism is far from dead, however. See, e.g., Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J. L. & PUB. POL'Y 11, 18 (1998) (“The text of the Constitution is about structure—about form.”); Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) [hereinafter Scalia, *The Rule of Law*] (urging the avoidance of “totality of the circumstances tests” and “balancing modes” in order to facilitate the rule of law rather than the rule of



to the extent that indeterminacy is an ineliminable part of legal practice, this Article argues that constitutional interpretation requires an initial understanding of the role that vision plays in shaping our interpretive debates. Part I examines the relationship between interpretation and indeterminacy, and argues that vision focuses critical attention on the ways that legal claims are seen (or not seen), not solely as matters of reading or textual interpretation, but as *matters of concern* to which attention may be drawn.

That vision is undeniably important to the law, is confirmed when one considers the cultural importance of justice represented as the ancient goddess Justitia—blindfolded, holding a balance and a sword. Part II argues that the representation of Justice blinded suggests, among other things, that the visual orientation of legal practice is central to an understanding of the practice. When Justice is blinded to some aspects of social reality, she is able to focus attention more precisely on others. When it comes to rendering justice in the constitutional context, examples of how blind Justice sees include use of tiered scrutiny in equal protection doctrine,<sup>26</sup> limitations on considering structural harms such as those alleged in *McCleskey v. Kemp*,<sup>27</sup> and congressional control over federal court jurisdiction.<sup>28</sup>

The figure of blind Justice also suggests that the practice of judging is inseparable from ways of seeing. Judges, as well as Justices, are supposed to follow rules and precedents already laid down. Rules, however, are themselves indeterminate. If we are to avoid an unconstrained and free-wheeling judiciary in light of this indeterminacy, we must consider whether and to what extent judicial vision should be constrained. Moreover, since the occasional new way of seeing is inevitable, we must contemplate what guides the process of change. To address these questions, Part III employs insights from Ludwig Wittgenstein's later philosophy to develop an account of the practice of judging as a practice of articulating visions of the law.

Once we better understand how the practice of judging depends on vision, further questions arise concerning conflicts among and

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judges); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988) ("My goal is . . . to rescue formalism from conceptual banishment.").

26. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all race-based classifications must receive strict scrutiny).

27. 481 U.S. 279, 312-13 (1987) (holding statistical evidence indicating that black defendants in Georgia received death penalty more frequently than white defendants insufficient to establish discriminatory intent for purposes of Equal Protection Clause).

28. U.S. CONST. art. III, § 1.

transformations between competing visions. Constitutional interpretation seems particularly prone to transformational shifts. How do we understand the transformation from one way of seeing to another, especially when the change has far-reaching consequences as in the New Deal abandonment of *Lochner's* vision? Part IV considers this problem, and again employs insights from Wittgenstein to sketch an account of constitutional transformation. When contending constitutional visions are at stake, we need more than particular strategies for interpreting textual provisions; rather, we need narrative articulations of how contending parties would have us see the overall landscape of constitutional culture as well as the place of particular practices within that landscape. If this Article is successful, the effect will be to focus attention on the ways that envisioning the Constitution situates the narrow, textually dominated problems of indeterminacy and interpretation in legal practice.

#### I. VISION, INTERPRETATION, AND INDETERMINACY

Law requires interpretation. The problem is that interpretation requires texts, and texts have what H.L.A. Hart calls an “open texture.”<sup>29</sup> That open texture introduces indeterminacy, and in order to constrain the effects of indeterminacy scholars and judges develop methods of interpretation. Although interpretive techniques may succeed in providing guidance to the interpreter as well as narrowing the range of acceptable forms of interpretation, they never succeed in creating a closed system with determinate meaning. Meaning always escapes the confines of the method, and therefore indeterminacy is never fully banished. This focus on the dichotomy, or symbiotic relationship, between interpretation and indeterminacy, however, hides another way in which legal text is given meaning: through selection of matters as matters of concern.

Political, legal, and scholarly attestations to the fact that law is, or is centrally determined by, interpretation leave little doubt of interpretation's importance.<sup>30</sup> For Ronald Dworkin, “[l]aw is an interpretive concept,” and “[j]udges should decide what the law is by

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29. H.L.A. HART, *THE CONCEPT OF LAW* 128 (1961).

30. But see Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 709 (2005) (“Interpretation, while not foundational, is certainly essential . . .”); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203, 207 (1987) (arguing that adjudication is not an interpretive act but an imperative one, designed to create commands which are backed by the authority of the state).

interpreting the practice of other judges deciding what the law is.”<sup>31</sup> For Owen Fiss, “[a]djudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text.”<sup>32</sup> More dramatically, for Robert Cover, “[l]egal interpretation takes place in a field of pain and death.”<sup>33</sup> We need not quote Justice Scalia, who wears the interpretive badge on his book’s cover: *A Matter of Interpretation: Federal Courts and the Law*.<sup>34</sup> Justice Scalia’s contribution highlights the degree to which the question of interpretation is no longer whether law is defined in terms of interpretive practices, but rather how best to go about the practice of interpretation.<sup>35</sup> Because when it comes to the Constitution, “[t]he document, of course, must be interpreted.”<sup>36</sup> As Thomas Grey asserts, “[w]e are all interpretivists . . . .”<sup>37</sup>

Casebooks regularly divide constitutional interpretive methodology between “originalists” and “non-originalists.”<sup>38</sup> This way of presenting interpretive methodologies suggests that James Ryan is not exaggerating when he claims that “[f]or the last fifteen years or so, Justice Antonin Scalia and his sympathizers within and outside the academy have dominated discussion and debate over how best to interpret the Constitution.”<sup>39</sup> Originalists, like Justice Scalia, are

31. RONALD DWORKIN, *LAW’S EMPIRE* 410 (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*].

32. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

33. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

34. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

35. Justice Scalia is not alone among Justices who have entered the debate over how best to interpret the Constitution. See, e.g., BREYER, *supra* note 4, at 5 (asserting that courts must consider the democratic nature of the Constitution when interpreting both statutory, as well as constitutional, texts); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698-99 (1976) (arguing that the concept of the “living Constitution” has given rise to the misguided notion that the unelected judiciary should play a role in solving society’s problems).

36. Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000) [hereinafter Amar, *The Document and the Doctrine*].

37. See Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) (noting further that “the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt”).

38. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 818 (2d ed. 2005) (presenting due process interpretation as divided between “originalists” and “non-originalists”).

39. James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1623 (2006). Not all originalists are alike, however. See, e.g., Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 150 (2007) (using Paul Grice’s philosophy of language to conclude that “[t]he meaning of the Constitution is best understood as the clause meaning of its provisions”); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV.

primarily concerned with limiting the proper sphere of judicial decision-making, while providing strict interpretive guidelines for interpretation embedded in history and tradition.<sup>40</sup> Everyone else engaged in the interpretive enterprise, the “non-originalists,” are likewise concerned with guiding judicial decision-making, although they are far less concerned with formalist modes of constraining discretion.<sup>41</sup> For example, Ronald Dworkin argues that because abstract statements of principle constitute “the appropriate mode or level of investigation into the original intention, then judges must make substantive decisions of political morality not in place of judgments made by the ‘Framers’ but rather in service of those judgments.”<sup>42</sup> Of course, there are other ways of carving up the constitutional interpretive landscape, for example, Amar’s distinction between documentarians (those who focus on the document and its history) and doctrinalists (those who focus on judicial doctrine animating constitutional provisions),<sup>43</sup> and those like David Strauss who emphasize the common-law nature of constitutional decision-making.<sup>44</sup> More generally, narrative approaches to the law<sup>45</sup> as well as

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1599, 1629 (1989) (arguing that originalism has become indistinguishable from nonoriginalism in that both “seek the truths that the Constitution conveys to us”).

40. See Scalia, *The Rule of Law*, *supra* note 25, at 1179 (advocating for the creation of “clear, general principle[s] of decision”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) [hereinafter Scalia, *Originalism*] (explaining that originalism “establishes a historical criterion that is conceptually . . . separate from the preferences of the judge himself”); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 351-52 (1990) (asserting that “judges must always be guided by the original understanding of the Constitution’s provisions”); Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J. L. & PUB. POL’Y 479, 486 (1996) (stating that the only reading of the Constitution that justifies the preservation of a judicial role is one rooted in textualism and originalism); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 548 (2003) (discussing originalists’ commitment to using linguistic and legal principles to uncover the meaning of the Constitution as understood by the founders). But see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 238 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that the drafters of the Constitution did not envision an interpretative strategy that resorts purely to the “intent of the framers”).

41. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 9-119 (1982) (describing six interpretive modalities); Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 67-74 (1997) (describing eight different tests that the Court applies to implement the Constitution).

42. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490 (1981).

43. Amar, *Document and Doctrine*, *supra* note 36, at 26-27.

44. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that the common-law approach is the most effective approach to constitutional adjudication because it reflects understandings that evolve over time, and rejects the notion that law must come from a single authoritative source).

45. See Cover, *Nomos and Narrative*, *supra* note 24, at 5 (“[L]aw and narrative are inseparably related.”). See generally LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2 (Peter Brooks & Paul Gewirtz eds., 1996) (examining law as “stories,” rather

the law and literature movement have focused attention on the interpretive aspects of the law.<sup>46</sup>

Each one of these interpretive approaches claiming how best to interpret the Constitution specifically, as well as legal texts more generally, presents a vision of what the law is or should be.<sup>47</sup> Each one also highlights particular institutional actors and problems and leaves others mostly in the background. Originalists direct their attention primarily to the federal judiciary, responding to the “counter-majoritarian” difficulty with a profound distrust of the non-elected third wheel of government.<sup>48</sup> Trust is a major theme. Others direct their attention to the ability of the law to embed, articulate, and further fundamental shared public values through interpretation of the law.<sup>49</sup> Fundamental rights and values are central themes.

Each approach presents a competing vision that focuses on different aspects of law and legal practice. Competing visions can exist either at the level of “clause-bound” constitutional

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than collections of rules and policies); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 7 (1991) (employing a narrative form of legal analysis).

46. See, e.g., JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* ix (1985) (arguing that reading law and literature share similarities, and that “reading a legal text is often not so much reading for a single meaning as reading for a range of possible meanings”).

47. Mark Tushnet argues that advocates of both “neutral principles,” such as Herbert Wechsler, and advocates of “interpretivism,” such as John Hart Ely, attempt to implement a similar vision of liberalism.

Interpretivism attempts to implement the rule of law by assuming that the meanings of words and rules are stable over extended periods; neutral principles does the same by assuming that we all know, because we all participate in the same culture, what the words and rules used by judges mean. In this way, interpretivism and neutral principles attempt to complete the world view of liberalism by explaining how individuals may form a society.

Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983) [hereinafter Tushnet, *Following the Rules Laid Down*]; see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 8-9 (1980); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

48. “But when the Court, without warrant in the Constitution, strikes down a democratically produced statute, that act substitutes the will of a majority of nine lawyers for the will of the people.” BORK, *supra* note 40, at 264. Alexander Bickel provides the classic statement of the counter-majoritarian difficulty:

[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it . . . it is the reason the charge can be made that judicial review is undemocratic.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962).

49. See, e.g., OWEN FISS, *THE LAW AS IT COULD BE* ix (2003) (explaining that the role of judges is to “measure practical reality against the values made authoritative by the law and then seek ways to bring that reality into accord with these values”).

interpretation, by focusing on the meaning of each clause in isolation, or at the level of “grand vision,” by synthesizing a vision of the Constitution as a whole.<sup>50</sup> At either level, an argument about how to interpret a unit of constitutional law is inevitably an argument about how one should see that unit in context, in application, and in relation to other units of law and aspects of life. In an important respect, vision determines interpretation. What aspects of law one focuses on, how closely one looks, and how clearly one sees those aspects determines the manner in which an interpretive methodology is deployed.

Moreover, at the level of constitutional theory more generally, how one sees the relative roles and importance of values, such as separation of powers, judicial review, legislative power, or executive prerogative will drive interpretive methodology and outcomes. For example, against more robust understandings of the role of the Supreme Court and judicial review, Mark Tushnet<sup>51</sup> and Larry Kramer<sup>52</sup> both argue for repudiating our current understanding of judicial supremacy regarding constitutional interpretation.<sup>53</sup> Kramer, for example, advocates a version of popular constitutionalism in which each branch of government has responsibility for interpreting the Constitution.<sup>54</sup> This approach preserves the power of “We the People,” to say what the law is and avoids the prospect of our being “ruled by a bevy of Platonic Guardians.”<sup>55</sup> These different views on the nature of judicial review inform both interpretive methodology and ultimate outcomes on at least some constitutional issues.<sup>56</sup> For

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50. *E.g.*, ACKERMAN, FOUNDATIONS, *supra* note 6, at 3-5; ACKERMAN, TRANSFORMATIONS, *supra* note 10, at 420; AMAR, AMERICA’S CONSTITUTION, *supra* note 22, at xi-xii; JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 12-13 (2005) (uncovering an interpretive structure that “emerges from the deepest democratic commitments of constitutional law”).

51. See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999) (arguing that the people should “reclaim” the Constitution from the courts).

52. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 248 (2004) (“The Supreme Court is not the highest authority in the land on constitutional law. We are.”).

53. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (“[J]udicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society.”). See generally JEREMY WALDRON, LAW AND DISAGREEMENT 10-17 (2001) (discussing the counter-majoritarian aspects of judicial review).

54. KRAMER, *supra* note 52, at 247-48; Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4, 16-60 (2001).

55. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

56. Outcomes depend, for example, on how broadly a court exercises the power of judicial review. See, e.g., Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 53-69 (1996) (explaining how judicial minimalism affected the Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996)); see also CASS R. SUNSTEIN, ONE CASE

example, Kramer argues<sup>57</sup> that the view of judicial supremacy found in footnote four of *United States v. Carolene Products Co.*<sup>58</sup>—and employed in cases like *Cooper v. Aaron*<sup>59</sup>—makes possible the outcomes produced in federalism cases such as *United States v. Lopez*<sup>60</sup> and *New York v. United States*.<sup>61</sup>

Or take another example, differing positions regarding the role of judicial review of executive action in national security and international affairs will produce different interpretive outcomes in particular cases. The Supreme Court's willingness to assert judicial power to review executive detention of persons designated "enemy combatants" in cases such as *Hamdi v. Rumsfeld*,<sup>62</sup> and its willingness to confront unilateral exercises of executive authority in creating military commissions in *Hamdan v. Rumsfeld*,<sup>63</sup> derives from broader visions of the separation of powers as well as visions of the judicial obligation to protect individual liberties.

With regard to the liberty protecting role, the Court has varied in its own practice, deferring typically during times of crises, as the Court did when upholding Japanese internment in *Korematsu v. United States*,<sup>64</sup> but asserting a stronger protective vision in other times of national struggle, as the Court did when it struck down President Truman's wartime seizure of steel production in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>65</sup> Indeed, in the latter case, the Court struggled to articulate a method by which to review executive assertions of inherent power under the Constitution, leading Justice Jackson to comment in concurrence that "[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."<sup>66</sup> Given the difficulty in determining how closely to scrutinize wartime or emergency executive actions, some critics such as Judge Richard

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AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix-xiv (1999) (advocating narrow or minimal constitutional decisions).

57. KRAMER, *supra* note 52, at 219-26.

58. 304 U.S. 144, 152 n.4 (1938).

59. 358 U.S. 1 (1958).

60. 514 U.S. 549 (1995).

61. 505 U.S. 144 (1992).

62. 542 U.S. 507 (2004); *see* *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004) (concluding that the federal habeas statute granted U.S. district courts jurisdiction to hear claims of noncitizens detained at Guantanamo Bay, Cuba).

63. 126 S. Ct. 2749 (2006).

64. 323 U.S. 214 (1944).

65. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

66. *Id.* at 634.

Posner,<sup>67</sup> as well as Adrian Vermuele and Eric Posner,<sup>68</sup> have argued that judges should defer to such action. They argue that judges cannot improve on the decisions the President makes in such situations, and accordingly, there is no, or a very limited, role for judicial review.<sup>69</sup> Essentially, in their view, judges lack the institutional capacity in terms of knowledge and expertise to pass judgment on issues related to national security, especially during times of emergency.

By contrast, most other constitutional theorists, including David Cole<sup>70</sup> and Bruce Ackerman,<sup>71</sup> each in different ways, argue for vigorous judicial review of such unilateral executive action. Vermuele and Posner's position is not based upon constitutional interpretation, but on their view of consequentialist policy judgments designed to maximize overall social welfare, supplemented by a view of constitutional structure that grants the executive sole authority to respond to emergencies.<sup>72</sup> Ackerman's view could not differ more. Ackerman's proposed solution to emergency executive action—in short, to provide a framework statute allowing a brief period following an emergency event in which the executive can act unilaterally, followed by a quick resumption of congressional and judicial checks on that action—is one that views constitutional structure as the guide and linchpin for solving potential constitutional crises.<sup>73</sup> Ackerman's view of structure, based on constitutional history and tradition, as well as text, is one that contemplates a role for all three branches of government, even during emergencies.<sup>74</sup> These opposing views of executive power and

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67. See RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 158 (2006) (arguing that the law must adapt in times of emergency).

68. See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 275 (2007) (asserting that the law must not “shackle” the government in situations of emergency).

69. See *id.* at 5 (contending that, during times of national emergency, the executive branch's speed and flexibility make it better suited to determine the necessary trade-offs between liberty and security).

70. DAVID COLE, *ENEMY ALIENS* 230-33 (2003) (discussing the need for constitutional constraints to prevent government overreaction during times of crisis).

71. BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 101-21 (2006) [hereinafter ACKERMAN, *BEFORE THE NEXT ATTACK*].

72. See POSNER & VERMEULE, *supra* note 68, at 17 (arguing that the proper scope of judicial review during national emergencies is one that gives “high deference” to executive actions).

73. See ACKERMAN, *BEFORE THE NEXT ATTACK*, *supra* note 71, at 80-87 (claiming that his proposed statute, the “Supermajoritarian Escalator,” will guarantee against the indefinite extension of the emergency state).

74. See *id.* at 120 (explaining that both Congress and the judiciary play an important oversight role over the executive during emergency situations).



judicial review in relation to national security matters are not determined by parsing the meaning of constitutional text alone. Rather, how one views the relationships among specific constitutional provisions with the document as a whole, as well as the structural relationships the document creates, will also drive interpretive outcomes.<sup>75</sup> While the materials may be “enigmatic” as Justice Jackson suggests, equally important, and no less obscure at times, is the way one sees the matter to be decided in all its cultural, institutional, structural, and temporal complexities.

What these considerations of constitutional theory underscore is the way in which prior visions of constitutional purpose, structure, and text influence the framework within which specific acts of interpretation occur. Decisions about broader constitutional theory are often choices regarding the importance of democracy, deliberative process, or institutional capacity that need not depend themselves on the specific text under interpretation. Choice of interpretive methodology itself seems unavoidably a matter of vision. When considering limitations to its interpretive methodology, the Court, through Chief Justice Hughes has stated:

It is no answer . . . to insist that what the provision of the Constitution meant to the vision of [the framers'] day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.<sup>76</sup>

What is clear from this passage is a recognition that vision may change over time while the object of interpretation—the constitutional text—may stay the same. The self-refutation of the “originalist” position identified by Chief Justice Hughes is not found in a proposition about interpreting constitutional text, *contra* advocates of that position such as Justice Scalia,<sup>77</sup> but rather in the

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75. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 67-98 (1969) (discussing the effect of structural considerations on judicial review).

76. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

77. “[T]he originalist at least knows what he is looking for: the original meaning of the text,” a view which Justice Scalia contrasts with “the philosophy which says that the Constitution *changes*.” SCALIA, *supra* note 34, at 45. Justice Scalia misses Chief Justice Hughes’ point: the “conditions and outlook” change with the time, not the Constitution. *Home Bldg. & Loan Ass'n*, 290 U.S. at 443. Because “outlooks” are unavoidably different in at least some respects over time, and since interpretation depends on the available outlook, constitutional interpretation now will unavoidably

impossibility of having the same vision as the framers. Because vision unavoidably changes with different cultural, institutional, and temporal settings, the way of seeing the constitutional text to be interpreted changes as well. Thus, what gets selected as a matter of concern, a matter of constitutional possibility, will alter with transformations in vision.

For example, the growth of substantive due process as a means to protect fundamental rights tracks a change in the way that the Court sees its institutional role and sees the overall design and purpose of the Constitution. Under substantive due process, the Constitution not only expresses ideals of limited government and a private sphere of liberty, but also requires that the Court place limitations on government action to protect that liberty. In choosing a methodological approach, whether it be one of more limited review in an attempt to recreate something akin to the framers' vision, or the rights-protecting view from *Carolene Products*,<sup>78</sup> the Court adopts a particular way of seeing the place, role, and importance of fundamental rights which it then uses to interpret the Constitution.

Moreover, how the Court sees an issue of fundamental rights is essential to the ultimate disposition of claims arising under those rights. Perhaps no better illustration of this point exists than the contrasting ways of assessing what was at issue in Georgia's prosecution of an individual under its anti-sodomy law.<sup>79</sup> Writing for the majority, Justice White viewed the relevant issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."<sup>80</sup> By contrast, Justice Blackmun in dissent suggested that the issue was:

no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies . . . . Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."<sup>81</sup>

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be non-identical with constitutional interpretation then (during the founding period) in at least some subset of cases.

78. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (contemplating that "prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry").

79. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (denying claim that Georgia statute criminalizing homosexual sodomy violates a fundamental right).

80. *Id.* at 190.

81. *Id.* at 199 (Blackmun, J., dissenting) (citations omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

It is difficult to characterize this disagreement as a matter of conflicting interpretations. Rather, the different ways of stating the question in this case are possible because the majority and dissent each have a different way of seeing what right is at stake, its place within a larger social context, and the extent to which it should be protected under the Constitution.

Even if we were to agree on a single interpretive methodology, a problem nonetheless persists, whether it is articulated in terms of vision or in terms of interpretation. This is the inescapable problem of legal indeterminacy.<sup>82</sup> Attempts to constrain judicial interpretation of the Constitution must always confront textual provisions that fundamentally resist complete determinacy. The lifeblood of legal practice pulses on the expectation that something always escapes full determination, leaving open space to make plausible interpretive arguments in the future. Indeterminacy can be controlled in some contexts, but no interpretive methodology can provide complete control in all circumstances. The problem of indeterminacy gives rise to proposals for more rigid methods of interpretation which in turn give rise to further occasions for indeterminacy to develop. This cycle has led some to embrace indeterminacy, not as a problem, but as an opportunity.

Within the legal academic community, Critical Legal Studies (“CLS”) scholars have made significant contributions to legal thought by emphasizing the problem and consequences of legal indeterminacy.<sup>83</sup> They argue that legal rules do not determine adjudicative results and that legal analysis cannot determine whether a proposition of law is correct.<sup>84</sup> One source of indeterminacy, according to CLS scholars, is that propositions of law always contain unstated ideological commitments that are themselves unstable and indeterminate.<sup>85</sup>

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82. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 970 (2003) (advocating a flexible, “experimentalist” institutional approach to legal indeterminacy).

83. See ROBERTO MANGEBEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 7 (1986) (critiquing indeterminacy in objectivism and formalism); Jeremy Paul, *CLS 2001*, 22 CARDOZO L. REV. 701, 706-07 (2001) (discussing CLS’s use of indeterminacy).

84. See Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPAC L. REV. 339, 341 (1996) [hereinafter Tushnet, *Defending the Indeterminacy Thesis*] (“Most discussions of the indeterminacy thesis identify some common ground between its proponents and its critics. Nearly everyone agrees that *some* legal propositions are indeterminate.”).

85. See, e.g., Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1213 (1985) (noting the contribution of changes in language to the instability of legal concepts).

Constitutional originalists, by contrast, have seized on the problem of indeterminacy as well, though for very different reasons. For them, indeterminacy raises the specter that judges will decide cases on the basis of idiosyncratic personal preferences.<sup>86</sup> Thus, in response to the possibility that unconstrained judges would undermine the rule of law, indeterminacy becomes a reason to provide a methodological means of limiting judicial discretion. Indeterminacy also becomes an occasion to enshrine ideological preferences under the guise of providing supposed neutral methodologies of interpretation such as constitutional originalism.<sup>87</sup> Each response to the opportunity provided by indeterminacy operates as the flip side of the same coin. Indeterminacy is the currency of theories of interpretation.

Critical theories are not all negative, however, as some also claim indeterminacy as an opportunity to reshape substantive law in progressive ways. In general, for CLS scholars indeterminacy provides an opportunity to re-imagine legal thought and the possibilities for legal institutions.<sup>88</sup> By demonstrating the hollow core to claims of doctrinal determinacy in law, indeterminacy critique can also provide the opportunity for renewed normative legal thought.<sup>89</sup>

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86. Cf. Nelson, *supra* note 40, at 524 (addressing the possibility of reconciling originalism with individual judges' understanding of legal principles).

87. An example of employing method to advance ideological preference is found in Justice Scalia's opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). To avoid the expansion of constitutionally protected human rights under substantive due process analysis, Justice Scalia argues we can only identify which fundamental rights are guaranteed by the U.S. Constitution by examining traditional practices. *Id.* at 122 n.2. If the claimed human right has not been traditionally recognized and protected, it cannot now be protected as "fundamental" under substantive due process. *Id.* at 122. The ideologically contentious issue of identifying fundamental human rights in the Constitution is "solved" by recourse to a supposed neutral methodology of interpretation which looks to "original" traditions. See Scalia, *Originalism*, *supra* note 40, at 862-63 (highlighting the additional problem of the inability for people to agree on new meanings of text if originalism were cast aside). Of course, one obvious problem with this "solution" is that what counts as "tradition" is as susceptible to preferred ways of seeing as is the identification of fundamental rights in the first place. Moreover, within anything we might identify as a tradition, there will always be contested elements to that tradition, suppressed counter-traditions, and indeterminacy in how the tradition is understood and articulated by its practitioners. See generally J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990) (discussing the counter-tradition problem).

88. See Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1, 19-20 (1996) (addressing "the idea of legal analysis as institutional imagination" and promoting a "method" of analysis "free of the taint of institutional fetishism and structure fetishism").

89. Normative critique itself is not without its own problems of indeterminacy of social context and legal interpretation. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 188 (1990) (observing that "normative legal thought is

Take, for example, the argument by Joseph Singer, following Richard Rorty, presenting what he calls an “edifying” theory of law.<sup>90</sup> In this account, the purpose of legal theory is not simply to unmask the latent political and ideological roots of judicial decision-making, but also to free us from what Rorty calls “outworn vocabularies” in which our mistaken belief in the objectivity of existing doctrine ensnares us.<sup>91</sup> Freed from the commitment to the “truth” of particular doctrines and particular vocabularies, the critical theorist can see “that a wider range of alternatives is available to us.”<sup>92</sup>

Despite the furor over the indeterminacy of law, the rumors of law’s demise have been premature.<sup>93</sup> Recognition that law, like any text more generally, is indeterminate has not brought about wholesale nihilism in the legal profession.<sup>94</sup> Indeterminacy as a source of radical legal critique is not new, but has been the object of a venerable legal realist tradition.<sup>95</sup> Because the political and social contexts in which doctrinal indeterminacy might arise are themselves not stable, new situations arise all the time that strain the formalist claims to legal determinacy. Nonetheless, the issue of indeterminacy has run like a counter-current in the flow of legal scholarship and persists as a recurring theme in our critical understandings and

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grounded on an utterly unbelievable re-presentation of the field it claims to describe and regulate”).

90. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8 (1984) [hereinafter Singer, *The Player and the Cards*] (building on Rorty’s ideas and rejecting notions of determinacy and rigidity in law).

91. See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 373 (1979) (suggesting that “edifying philosophy aims at continuing a conversation rather than at discovering truth”).

92. Singer, *The Player and the Cards*, *supra* note 90, at 59.

93. See generally Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 14 (1986) (“Law has been threatened by the disintegration of public values in the larger society, and its future can only be assured by the reversal of those social processes.”).

94. If Stanley Fish’s point that theory has no consequences itself has application anywhere, then it must apply to the minimal significance that the CLS emphasis on the indeterminacy of law has had for the actual practice of law. See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 315 (1989) (arguing against the idea that “the very point of theory [is] to throw light on or reform or guide practice”).

95. Legal Realists, for example, took indeterminacy as an opportunity for progressive interpretation. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935) (“A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, . . . that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event.”). More generally, indeterminacy arises from the failed formalist aspirations of legal practice. See JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1 (2d ed. 1986) (analyzing problems in legal practice with “legalism” as “the ethical attitude that holds moral conduct to be a matter of rule following”); see also Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 120 (2003) (summarizing some of the faults of the formalist perspective).

practices of law.<sup>96</sup> This problem of indeterminacy has plagued scholars as diverse as those with more traditional approaches, such as Alexander Bickel,<sup>97</sup> to those who might be called “postmodern,” such as Jack Balkin.<sup>98</sup> Moreover, postmodern thought more generally has also focused on the failure of formalism, calling attention to the contingent and de-centered nature of social life and meaning.<sup>99</sup> The postmodern critique, however, is not without problems and critics.

French theorist Bruno Latour observes that the postmodern movement is a game of double gotcha.<sup>100</sup> Inserting “law” for Latour’s “facts,” the critic playing the game of gotcha must first show the naïve believer in the determinacy of law that laws are really indeterminate, a matter of political preferences, and that any appearance of immutable principle is merely the successful projection of particular preferences.<sup>101</sup> For example, various forms of legal realism purport to unmask what is really occurring behind commitments to legal doctrine and principle, at least where theories of adjudication are concerned. This unmasking has been so

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96. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* {FIN DE SIÈCLE} 19 (1997) (noting indeterminacy plagues liberal projects, and arguing “that ideology influences adjudication, by structuring legal discourse and through strategic choice in interpretation”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774 (1976) (identifying moral indeterminacy in private law). But see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549, 594 (1993) (arguing that adjudicatory indeterminacy does not undermine liberalism). See generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 1 (1995) (arguing that “the ways in which jurisprudential concepts and themes are interpreted and applied influence the manner in which ideas about law come to be understood historically”); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517, 527 (2000) (noting the widespread acceptance of the idea of legal indeterminacy).

97. BICKEL, *supra* note 48, at 16.

98. With regard to deconstruction, Jack Balkin observes that “[t]he difficulty was not that ideology made law indeterminate but that it produced a brittle, oppressive determinacy. The problem was not the rogue judge but the sincere judge. This judge was always bound, not merely by doctrine but also by the limits of his or her political and legal imagination.” Jack M. Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719, 737 (2005); see Jack M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1985 (1992) (observing that “[p]ostmodern legal culture is . . . a legal culture mimetic of postmodernity: fragmented, decentered, diffused”); Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 767 (1987) (explaining deconstructive practice as manipulation of conceptual oppositions).

99. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 16-17 (Geoff Bennington & Brian Massumi trans., 1984) (eschewing grand narratives of human knowledge for situated and local “language games”); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* xv (1989) (sketching the figure of the ironist, a “person who faces up to the contingency of his or her own most central beliefs and desires”).

100. Bruno Latour, *Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY 225, 237-39 (2004).

101. *Id.* at 237-38.

pervasive in how law has come to be understood that the phrase “we are all legal realists now” is a cliché scholars cannot restrain themselves from repeating.<sup>102</sup>

Having shown that law is really indeterminate and grounded in preferences and naked assertions of power, the postmodern legal critic has cleared the way for the second move in our game of theoretical gotcha. The critic now argues that the indeterminacy has definite shape after all, through hidden structures of economic oppression or racial subordination.<sup>103</sup> What at first may seem like unshaped indeterminacy is given form through the critic’s ability to make visible the hidden structures that explain the real vehicles of law. CLS and critical race theory sometimes purport to find determinate social and political structures behind the superficial indeterminacy of law; where politics would seem to be the free expression of preferences, critique finds unconscious, structurally hidden means of social organization.<sup>104</sup>

With regard to indeterminacy, all these critical positions reject the formalist vision of law as grounded in objective and rationally determinate principles and at the same time argue that politics gives a particular kind of hidden structure to law. Thus, the formalist belief in the objective reality of rationally grounded legal principle is shown to be the unwitting and naïve dupe to powerful political and social forces that make law indeterminate. Moreover, the realist belief in the interplay of social forces, private preferences, and autonomous choices is shown to be the misguided acceptance of visible transactions determined by hidden structures.<sup>105</sup> Through this

102. See, e.g., Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 690 (2003) (discussing legal realism’s roots in classical American pragmatism); see also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997) (noting that “as the cliché has it, . . . ‘we are all realists now’”); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all legal realists now.”).

103. See Latour, *supra* note 100, at 238 (suggesting gender and class as additional factors of control).

104. See, e.g., WILLIAMS, *supra* note 45, at 10 (noting that life is complicated, and that “[l]aw too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths”); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005) (employing methods of social cognition to demonstrate systemic racial bias at an unconscious level); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (suggesting a way in which judges could recognize unconscious racism).

105. Under the critical perspective,

[y]ou are always right! When naïve believers are clinging forcefully to their objects, claiming that they are made to do things because of their gods, their

unending game of gotcha, the critical seduction of indeterminacy as a mode of critique unsettles unselfconscious doctrinal analysis, but does not leave much reconstructive work for critics and legal practitioners to do.

In our captivation by a recognition of indeterminacy, what Latour suggests is missing is that we have lost a sense of what he calls “matters of concern.” What I take him to mean by “matters of concern” are the issues, “the gathering, the Thing” as he puts it, which motivated critique in the first place.<sup>106</sup> I argue that what motivates legal practitioners and theorists to be concerned on the one hand by the failures of legal formalism, and on the other hand by the excesses of indeterminacy critique, is that we share an interest in law’s vision. We care about the capacity of law to see and to attend to claims of justice, fairness, and due process, for example, in ways that make perspicuous particular aspects of our social needs and shared practices.

It may be that terms such as “justice” are all terms deeply implicated in a particular version of liberalism, a key ideological component of a broader way of seeing. Nonetheless, they serve as placeholders for the kinds of commitments and institutional arrangements needed to fulfill human hopes and desires and to promote individual and collective human flourishing. As for making available matters of concern, vision is analytically prior to interpretation and the problems of indeterminacy. Judges must first select a text to be interpreted, must be able to see a problem or issue as relevant, and must be willing to attend to the implications of what they see.

Within broader jurisprudential debates, the question of law’s vision is not captured by the notion of “preinterpretation,” especially as it is

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poetry, their cherished objects, you can turn all of those attachments into so many fetishes and humiliate all the believers by showing that it is nothing but their own projection, that you, yes you alone, can see. But as soon as naïve believers are thus inflated by some belief in their own importance, in their own projective capacity, you strike them by a second uppercut and humiliate them again, this time by showing that, whatever they think, their behavior is entirely determined by the action of powerful causalities coming from objective reality they don’t see, but that you, yes you, the never sleeping critic, alone can see where that objective reality may be “economic infrastructure, . . . social domination, race, class, and gender, [or even] neurobiology [or] evolutionary psychobiology . . . .”

Latour, *supra* note 100, at 237, 239.

106. Latour, *supra* note 100, at 246. Though I would not go so far as to advocate eschewing critique as Latour does, I do go along with the need to rearticulate the role of criticism in everyday lives in ways that bring us closer, rather than draw us further away, to others and to those things that are matters of concern for us.



often mentioned in connection with constitutional interpretation<sup>107</sup> or in relation to Ronald Dworkin's three stages of interpretation.<sup>108</sup> For Dworkin, in the "preinterpretive stage" the interpreter identifies particular content to the rules and standards of a practice as a tentative place to begin the process of constructive interpretation.<sup>109</sup> Dworkin analogizes this stage to identifying a particular novel as a text to be interpreted.<sup>110</sup> In this respect, Dworkin articulates one aspect of the way in which vision is both prior to interpretation and active in guiding interpretation.<sup>111</sup> But Dworkin's preinterpretive stage does not question the mechanisms by which attention is drawn to particular matters for interpretation in the first place; rather, Dworkin's project is one that articulates law as a practice of constructive interpretation. Thus, his primary account begins at the point when the object or practice has already been presented for interpretation—with a vision of the law already in place.<sup>112</sup>

Often the Supreme Court's own commentary on its visual inclinations reflects a self-conscious capacity to attend to particular aspects of a legal problem. For example, in *Terry v. Ohio*,<sup>113</sup> the reasonable-suspicion principle is not derived merely from wringing meaning out of Fourth Amendment text, but by the Court's willingness to look for such meaning in social structure and cultural context. In *Terry*, the Court comments: "we cannot *blind* ourselves to the need for law enforcement officers to protect themselves . . . ."<sup>114</sup> In a very different context—considering the constitutionality of spousal notification requirements for abortions—the Court warns:

107. See, e.g., Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772 (1997) ("[C]onstitutional text matters because of the widespread contemporary acceptance of the text as a necessary starting point for interpretation.").

108. DWORKIN, *LAW'S EMPIRE*, *supra* note 31, at 65-66.

109. *Id.*

110. See *id.* at 66 (using *Moby Dick* as an example).

111. Jules Coleman observes about Dworkin's method: "The norms appropriate to an interpretation of a practice depend on the kind of practice it is. This means that in order to anchor an interpretation, we need some preinterpretive account of the kind of practice we are interpreting and of its purpose or function." JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 183 (2001).

112. In the end, Dworkin is interested in constructing an overall vision of what he calls "law as integrity":

We accept integrity as a distinct political ideal, and we accept the adjudicative principle of integrity as sovereign over law, because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in the right relation.

DWORKIN, *LAW'S EMPIRE*, *supra* note 31, at 404.

113. 392 U.S. 1 (1968).

114. *Id.* at 24 (emphasis added).

"We must not *blind* ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."<sup>115</sup> Even in its notorious opinion in *Lochner v. New York*,<sup>116</sup> the Court reflexively employed its powers of vision: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."<sup>117</sup> Moreover, the very idea of appellate judicial "review" contains an ocular metaphor, one which Chief Justice Marshall employed when establishing Supreme Court review of constitutional questions: "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law."<sup>118</sup>

At issue here is more than a turn of phrase. No doubt, judicial use of ocular metaphors stands in place of other concepts related to understanding and recognition. The frequent use of such language in judicial opinions, however, suggests that often what is at stake is more than an expression of how a court understands a principle of law. Frequently, at stake is not only a court's ability to see legal principles in a particular and relevant light, but also its willingness to see particular features of social and institutional life. For example, during a historic moment of jurisprudential transformation, the Supreme Court, in considering the constitutionality of legislation central to the New Deal, recognized that more than textual interpretation was at stake. In refusing to rely on a more formalist doctrinal approach to Congress's commerce power, the Court noted, "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."<sup>119</sup>

A capacity to attend to particular aspects of legal argument and particular features of social life does not exhaust the ways in which vision is important to legal thought and practice. Attention implicates the persons who make their appearance before judges and

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115. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (emphasis added).

116. 198 U.S. 45 (1905).

117. *Id.* at 64.

118. *Marbury v. Madison*, 5 U.S. 137, 178 (1 Cranch) (1803).

119. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

magistrates. Vision as the practice of attending to matters of concern can also be a matter of discourse and dialogue about those topics, words, and concepts to which we give our consideration. Thus, attention is made possible in its relation to linguistic articulation. Although we may encounter others through the linguistic traces that they leave, the degree to which we encounter embodied others in public spaces is first a matter of directing our attention. Therefore, the moment prior to the dialogic encounter is the moment of seeing, the moment where another person is recognized and figured as a subject of attention. So not only are seeing and attending matters of embodiment, they are also matters involving language.<sup>120</sup>

Consistent with the critique of indeterminacy as a primary problem for legal practice, Richard Pildes provides a useful illustration of how vision can dominate critical approaches to the law. Pildes sets out to explain the Court's decision in *Bush v. Gore*<sup>121</sup> as the product of the "Court's general vision of democratic politics and the role of constitutional law."<sup>122</sup> In many respects, the decision in *Bush v. Gore* depended upon whether the justices saw a potential constitutional crises or vibrant democratic contestation. Looking to *California Democratic Party v. Jones*<sup>123</sup> as philosophical background, Pildes suggests that what animates the majority is a perspective that "sees a threat to the stability of the democratic order."<sup>124</sup> In contrast, the dissent employs a "competing vision[] of what makes democracy work . . . ."<sup>125</sup> These competing visions impact judicial statements concerning constitutional limitations on democratic processes.<sup>126</sup>

Responses to these competing positions—one that fears the effects of too much democratic participation, and the other that revels in

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120. This thought is closely tied to Wittgenstein's emphasis on the relation between seeing and grammar:

You have a new conception and interpret it as seeing a new object. You interpret a grammatical movement made by yourself as a quasi-physical phenomenon which you are observing . . . . But there is an objection to my saying that you have made a "grammatical" movement. What you have primarily discovered is a new way of looking at things.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 121e, § 401 (G. E. M. Anscombe trans., 1953). The ways in which we articulate through language matters for our attention are interrelated to our ways of looking at those matters.

121. 531 U.S. 98 (2000).

122. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 715 (2001).

123. 530 U.S. 567 (2000).

124. Pildes, *supra* note 122, at 704.

125. *Cal. Democratic Party*, 530 U.S. at 598 (Stevens, J., dissenting).

126. *Compare* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (holding constitutional a ban on "fusion" candidates), *and* *Burdick v. Takushi*, 504 U.S. 428, 441-42 (1992) (holding constitutional a statute prohibiting write-in ballots), *with* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (holding unconstitutional a prohibition against independents voting in party primaries).

the warp and woof of democratic processes—determine substantive outcomes more than any particular way of reading or understanding constitutional text. Pildes writes, “it is something beyond law, or facts, or narrow partisan politics in particular cases, that determine outcomes . . . .”<sup>127</sup> Through this critical approach to *Bush v. Gore*, we see how considerations of judicial vision can be at least as important as, and perhaps more important than, considerations of interpretation and indeterminacy.

Ironically, if I am right that so much depends on what judges and legal practitioners are willing and able to *see*, our primary cultural icon of justice is blind. This iconic figure maintains vision through other means: the primacy of judicial *insight* through carefully constrained, even blindfolded, *sight*.

## II. VISION AS BLIND JUSTICE

Consider the imposing image of Justitia—the Roman goddess of justice. Justitia is frequently represented as blindfolded, holding scales in one outstretched hand and a sword in the other. Of the many historical images of justice, frequently as a goddess, and sometimes as one of the cardinal virtues along with Prudence, Temperance, and Fortitude, perhaps the most familiar representation in American society is that of the blindfolded goddess Justice.<sup>128</sup>

On a little reflection, this familiar image is puzzling. Why is justice blind and what could it mean to say that she who is blind can decide what is just? What is the relation of weighing the content of paired scales to claims of justice? Why paired scales hanging in the balance? Who has placed the blindfold on justice? What then would be the relation between the possibility for just *insight* and just *sight*? What is the relation for judicial practice between seeing and being blinded? Can we so easily translate between the tactile experience of feeling the world, and the visual experience of seeing the world? However we might answer these questions, it seems clear that Justitia represents the perhaps unattainable ideal that “[i]t is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially.”<sup>129</sup>

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127. Pildes, *supra* note 122, at 714.

128. For more discussion of the multiple images and meanings in the representation of justice, see Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1729-33 (1986).

129. *United States v. Wilson*, 32 U.S. 150, 161 (7 Pet.) (1833).

Judicial eyes see with a different light. One response to the ideal of judicial blindness is to say that justice must blindly balance the scales because justice must not take cognizance of any personal attachment to claimant or content. If blinded, there will be no bias, no prejudice, no predisposition to see one claimant or the content of one claim in a better light than the other. If the judge can see the difference, then the judge might be inclined to view the claims in a light more favorable to one of the claimants. The act of blindness operates as a kind of self-restraint that makes its appearance as a rational response to the potential for judicial bias. Bias could only be a product of knowledge, suggesting a tension between the full cognition that comes with sight and the ability to render proper justice.<sup>130</sup> Thus, on this account, what blind justice sees is always partial and incomplete.

Another response to the ideal of blindness is to focus, not specifically on bias, but on fairness. Justice is blind and employs scales to ensure procedural fairness, an ideal fundamental to the Constitution's due process tradition. Procedure constrains judicial sight and provides criteria of relevance for what kinds of things Justitia might properly see. Like the mechanics of paired scales, procedure provides the mechanics for fair outcomes through the blind weighing of competing claims. Indeed, the very process of balancing the scales of justice is a tactile procedure. Justice does not need ocular vision when she can simply feel the pull of one scale against another.

This "pull" might be what Robert Cover means by indirection.<sup>131</sup> Cover considers the disability of blindness as enabling the attainment of fully conscious insight precisely because the route to direct knowledge of what is behind the "veil" has been foreclosed.<sup>132</sup> He describes another pull of justice blinded, however, in that "the strongest temptation . . . is the temptation to *see*—to overcome the elusiveness of indirection. Procedure is the blindfold of Justice."<sup>133</sup> On this view, procedure produces fairness by constraining the sight of Justice and champions *insight* over sight.

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130. See Curtis & Resnik, *supra* note 128, at 1764 ("A blindfolded Justice . . . may suggest the problematic relationship between judgment and knowledge . . .").

131. See Robert M. Cover, *Unpublished Manuscript*, in ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* 1231, 1231 (1988) ("Justicia in our tale has put on the blindfold to avoid the pitfalls of fear or favor; she has rendered it necessary to produce by indirection.").

132. *Id.*

133. *Id.* at 1232.

There is more than a mere play on words in the difference between insight and sight, for there is a deep sense in which the former is parasitic on the latter. Blinded, however, Justice need only feel the pull of the scales in balance. Fairness, then, comes from a kind of positional objectivity—the blind perspective of justice relies completely on the relative position of the balanced scales, a positional disposition for which sight is presumed unnecessary.<sup>134</sup> Justice depends on position, and position constrains the possibility of judgment and vision. To see with judicial eyes is to see from within a position situated in social, cultural and institutional settings.

A. *Social Structure and Vision*

Thomas Kearns and Austin Sarat write, “Justice, it seems, is a denial of sight though not of seeing, a regulation of information though not of knowing, a restriction on what is permissibly attended to though not a deficit in attention.”<sup>135</sup> Our image of justice is one that expresses the possibility of blindness, the prospect of a lapse in attention, to certain kinds of claims—those not easily amenable to being weighed in the balance.

One example of this kind of positionally objective judicial blindness is found in the Supreme Court’s decision in *McCleskey v. Kemp*.<sup>136</sup> There, the Supreme Court refused to take a careful look at evidence of systemic bias in the prosecution and sentencing of criminal defendants.<sup>137</sup> At trial, McCleskey introduced evidence from the Baldus study<sup>138</sup> of the dispositions of Georgia murder cases showing that black defendants in particular were more likely to receive capital sentencing than white defendants, and that when white persons were victims, black defendants were more likely to receive a capital sentence than when black persons were victims.<sup>139</sup>

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134. For an interesting development of the idea of positionally dependent observations, see Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 127-28 (1993).

135. Thomas R. Kearns & Austin Sarat, *Legal Justice and Injustice: Toward a Situated Perspective*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 1, 7 (Austin Sarat & Thomas R. Kearns eds., 1996).

136. 481 U.S. 279 (1987).

137. *Id.* at 290-91.

138. The study was conducted by Professors David Baldus, Charles Pulaski, and George Woodworth. *Id.* at 286.

139. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 328-45 (1997) (discussing the Baldus study and its implications).

Nevertheless the Court took the view that the statistical evidence of systemic bias, even if true, was irrelevant.<sup>140</sup> Since McCleskey could not show individual intent by the prosecutor, nor even generalized intent of the Georgia legislature, to discriminate against him on the basis of race, the Court was unwilling to consider his equal protection claim. This decision is a form of purposeful judicial blindness to certain features of the world—namely, the problem of structural racial subordination.<sup>141</sup> The objection follows swiftly to ask how is one to “see” structural subordination? It is nowhere visible in particular items in the world that one could pick out.

Indeed, defenders of *McCleskey* would point out that it is a matter of institutional competency that judges cannot see beyond the particular claims and the particular individuals appearing before them in dispute. *McCleskey* rests, however, on the view that claims are discretely packaged as separate from the patterns of conduct in which they arise.<sup>142</sup> We remove the actors to the dispute from their institutional and social settings, and then examine their relations in the rarified air of court procedure.

But persons who make claims before blind Justice appear as individuals who bring with them their own contexts, histories, and structural settings. So when McCleskey shows evidence that what it is, what it *means*, to be black like him in Georgia, that evidence can never be particularized towards him specifically in the way that the court imagines. Yet, the fact that it cannot be so particularized does not mean that it *cannot* be seen; rather it means that a choice is being made not to look at the way his claim emerges only by making visible its place within a pattern of conduct constituting his concrete social reality. Indeed, Randall Kennedy, employing visual metaphors, argues that “[p]aralyzed by fear that seeing would entail doing, the

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140. See Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 441 (1988) (declaring, “[t]he Court’s response to the detailed evidence set forth in support of Mr. McCleskey’s claim . . . was a labored ‘So what?’”).

141. Courts regularly reject statistical race-based discrimination claims. For example, despite providing statistical evidence of racial discrimination in Charleston County, South Carolina’s application of the death sentence for black defendants, Earl Matthews’ habeas petition was denied, and he was executed. *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997); see John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1781 (1998) (discussing *Matthews* as an example of the misapplication of *McCleskey* by lower courts).

142. See generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 473-74 (1995) (arguing *McCleskey* is a “disgraceful decision” because, while “acknowledging the risk of racial prejudice influencing the capital sentencing decision,” the Court concluded that the risk was not “constitutionally unacceptable”).

Justices inflicted upon themselves a myopia reminiscent of the one that afflicted the Court during the reign of *Plessy v. Ferguson*.<sup>143</sup>

This kind of blindness is not unique to the capital sentencing context. In the Court's equal protection cases, for example, there is variation in both the scrutiny given equal protection claims according to whether the Court sees the relevance of background social structures to equality. The Court's performance in this regard has not been entirely consistent, as we see the Court lurch from one context to another, acknowledging in some situations the relevance of social structure for equality. Differences in this regard are partially explained by the Court's using a method of "tiered scrutiny" review.<sup>144</sup> Tiered scrutiny, however, is just another way of naming the process by which the Court attends to particular aspects of some claims and not others. What matters is whether the Court is willing to look.

For example, in *Griggs v. Duke Power Co.*, the Court was willing to view claims based on structural and statistical discrimination against blacks in employment contexts.<sup>145</sup> But in *Washington v. Davis*, the Court refused to *see* the claim of "racially differential impacts" under the Fourteenth Amendment in the administration of an employment test.<sup>146</sup> In *Plyler v. Doe*, the Court was willing to look at the structural impacts from refusing education to the children of illegal immigrants.<sup>147</sup> But then in *San Antonio Independent School District v. Rodriguez*, the Court refused to see a judicial role for intervening in situations of gross inequality of school funding across school districts, claiming that there is no fundamental right to education.<sup>148</sup> In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court was able to see the structural discrimination in the assignment of school children to

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143. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1415-16 (1988). Kennedy further notes that by defining recognizable rights on the basis of practical concerns over remedies, "leads the Justices to obscure—for themselves and society as a whole—the reality they purportedly address." *Id.* at 1415.

144. See generally G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1 (2005) (exploring the Supreme Court's historical use of various levels of scrutiny when adjudicating alleged constitutional violations).

145. 401 U.S. 424, 436 (1971) (banning the use of employment requirements that have a racially discriminatory effect even without proof of discriminatory intent).

146. 426 U.S. 229, 252 (1976) (holding racially neutral qualifying test does not violate equal protection based on disparate impact). But see *Smith v. City of Jackson*, 544 U.S. 228, 231 (2005) (upholding disparate impact claim under Title VII).

147. 457 U.S. 202, 230 (1982) (holding that denying a public education to children based on immigration status violates equal protection).

148. 411 U.S. 1, 59 (1973) (holding that because education is not a fundamental right, unequal educational funding does not violate the Equal Protection Clause).



neighborhood schools.<sup>149</sup> But in *Milliken v. Bradley*, the Court was unable to look at the wider problem of inter-district suburban discrimination against urban minorities as warranting judicial cognizance of a constitutional harm.<sup>150</sup> In *Shelley v. Kraemer*, the Court was able to see the impact of legislative and judicial state action in enforcing racial covenants.<sup>151</sup> But in *Moose Lodge No. 107 v. Irvis*, the Court was unable to look at the role of state action in granting one of its limited numbers of liquor licenses to a private club that practiced racial discrimination.<sup>152</sup>

I am, of course, glossing over the doctrinal differences in these cases. But my point is not one of doctrinal analysis. What we discover, rather, through cases like these is that the Court's shifting vision drives substantive outcomes. When the Court is willing to look at the structural situation and see the structural harm, then it intervenes and attempts a remedy. Yet, if it is not willing to look closely at the claims of structural subordination of African Americans in school and employment contexts, for example, then the Court will not see a justification for adopting a remedial role in the particular domain. Although the texts of the decisions in these cases are presented as interpretations and applications of the Equal Protection Clause, what drives the judicial doctrine here is less the product of *interpretation* and more a product of the scope of the Court's vision in applying the constitutional doctrine. Willingness to attend to particular features of social structure and reality, however, is itself connected to views about the purpose of equal protection doctrine and the judicial role in enforcing equality norms. At stake is how the Court envisions the reach of constitutional norms into more deeply embedded social structures. When available, clear evidence of discriminatory intent makes for easy equal protection cases.

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149. 402 U.S. 1, 32 (1970) (upholding the district court's determination that allowing all Charlotte metropolitan area students to attend the school closest to their homes would perpetuate past segregationist policies); *see also* *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189, 214 (1973) (requiring a school district to present a realistic plan for desegregation); *Green v. New Kent County*, 391 U.S. 430, 444 (1968) (holding that a so-called "freedom of choice" plan allowing students to choose which school to attend insufficient to eliminate discrimination).

150. 418 U.S. 717, 753 (1974) (holding that courts cannot impose inter-district desegregation remedy unless districts were deliberately drawn to create segregated systems).

151. 334 U.S. 1, 23 (1948) (holding that state courts cannot enforce private restrictive covenants which exclude persons of a particular race from living in a particular area).

152. 407 U.S. 163, 179 (1972) (concluding that a state's award of a liquor license to a club that practiced racial discrimination was not state action under the Fourteenth Amendment).

Otherwise, the Court has usually been reluctant to look too deeply or too closely at more embedded and hidden violations of equality.

Attending to equality requires careful recognition of remedial limitations. Questions of remedy meld with questions of institutional adequacy as one route by which all courts constrain their sight. Even if a court is able to take judicial notice of the existence of harm to a particular person in virtue of that person's situation within a structural pattern, there may be little it can, or even should, do. This observation leads to the claim that such patterns that harm the particular person are best addressed by the legislative branch. It bears only a brief reminder that for all the efforts at school busing and court ordered remedial measures in the wake of *Brown v. Board of Education*,<sup>153</sup> by many accounts today's schools are as segregated as ever in many places.<sup>154</sup>

When the structural harm, and the institutional remedy, involves land use and patterns of residential development, the results have not been encouraging either. After years of litigation attempting to achieve more racially and economically integrated housing in suburbs in New York and New Jersey, little change in housing patterns has resulted.<sup>155</sup> Both of the *Mount Laurel Township* cases<sup>156</sup> and the *United States v. Yonkers Board of Education*<sup>157</sup> case involve courts taking a broad judicial vision of structural harms and structural remedies, refusing to remain blind by leaving the issue to the

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153. 347 U.S. 483 (1954).

154. See generally James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999) (citing statistics indicating that the desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to the lowest levels in three decades). Although the South remains the nation's most integrated region for both blacks and whites, it is the region that is most rapidly going backwards as the courts terminate many major and successful desegregation orders. See ERICA FRANKENBURG ET AL., CIVIL RIGHTS PROJECT OF HARVARD UNIVERSITY, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf> (last visited July 31, 2007) (noting that data from a survey of over 1,000 K-12 teachers indicates that teachers are teaching pupils largely of their own race, "adding a new dimension to school segregation").

155. See generally PETER H. SCHUCK, *DIVERSITY IN AMERICA* (2003).

156. See *S. Burlington County NAACP v. Mount Laurel Twp.*, 336 A.2d 713, 724-25 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (holding that a township's zoning ordinance that allowed only single family dwellings on large tracts of land and which had the effect of keeping low-income individuals from living in the township, was unconstitutional); see also *S. Burlington County NAACP v. Mount Laurel Twp.*, 456 A.2d 390, 410 (N.J. 1983) (affirming the principle of the first Mt. Laurel case and exclaiming that a "strong judicial hand" is necessary to fulfill the obligation to provide for a realistic opportunity for housing).

157. 518 F. Supp. 191, 198 (S.D.N.Y. 1981) (finding that the government's claim involving housing patterns and school segregation were claims upon which relief could be granted under the Fair Housing Act).

legislature. Again, the point is not to wade into the doctrinal intricacies of these cases, but to note that it is not a matter of textual interpretation or indeterminacy in the law that initially drives the possibilities here. Rather, what drives the court, the recognition of harm and the willingness to attempt a remedy, is the scope and intensity of judicial vision.

*B. Scrutiny, Principle, and Vision*

Textual interpretation is, of course, involved in many of these cases. How the Court construes the meaning of the Fourteenth Amendment's Equal Protection Clause is a factor in how the Court responds to structural claims. In determining the meaning of equality, the familiar problem is that the clause provides no self-executing rule for how to determine whether any person has been denied "the equal protection of the laws."<sup>158</sup> Government may classify persons on the basis of age, disability, gender or race, for example, in legitimate ways that would not violate a constitutional principle of equal protection. To determine when those classifications are legitimate, the Supreme Court has adopted a three-tiered approach to how much scrutiny it will give to a given equal protection challenge.<sup>159</sup> In determining, for example, whether a "suspect class" is involved in a challenge, which would trigger "strict scrutiny," requiring that a classification be "necessary to serve a compelling governmental interest," or a non-suspect class, which would trigger only "rational basis review," requiring that a classification be "rationally related to a legitimate governmental interest," what is at stake is how pervasive and probing a court's vision will be.<sup>160</sup>

Thus, the first interpretive task the Court confronts in an equal protection challenge is the task of determining how closely and how broadly it will look at the harm alleged.<sup>161</sup> How intensely the Court

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158. U.S. CONST. amend. XIV, § 1.

159. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (establishing that mental retardation is not a quasi-suspect class, meaning that statutory classifications need only have a rational basis to pass constitutional muster); *Craig v. Boren*, 429 U.S. 190, 209-10 (1976) (employing intermediate scrutiny to equal protection claim based on sex discrimination). On the need for such rules of mediation, see generally Mitchell N. Berman, *Constitutional Decisional Rules*, 90 VA. L. REV. 1 (2004).

160. The Court also employs "intermediate scrutiny" when a semi-suspect class, such as gender, is used. Under "intermediate scrutiny" the Court requires that a classification be substantially related to an important governmental interest, and requires the state show an "exceedingly persuasive justification" for differential treatment. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 530 (1996).

161. Tiered scrutiny is not without its detractors on the Court as exemplified by Justice Stevens's repeated criticism of this method. See *Parents Involved in Cmty.*

looks, the way in which it focuses its vision, determines substantive outcomes. A classification strictly scrutinized leads the Court to look exceedingly closely, and with utmost care, almost inevitably leading to a conclusion that the classification is unconstitutional,<sup>162</sup> whereas quite the opposite usually follows from rational basis review.<sup>163</sup>

After determining how to focus a court's vision, the second interpretive task of a court is to choose—even if only implicitly—a principle by which to provide equal protection of the laws. Owen Fiss has cast the central interpretive debate as one involving a choice of principles by which the Equal Protection Clause should be interpreted.<sup>164</sup> One candidate is the “anti-discrimination” or “anti-classification principle.” Its primary inquiry is determining which classifications of persons (e.g., race or sex) are suspect.<sup>165</sup> Such

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Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2798 (2007) (Stevens, J., dissenting) (“The Court’s misuse of the three-tiered approach to Equal Protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution.”); Vieth v. Jubelirer, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting) (“What is clear is that it is not the unavailability of judicially manageable standards that drives today’s decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.”); *City of Cleburne*, 473 U.S. at 451 (Stevens, J., concurring) (“I have never been persuaded that these so-called ‘standards’ adequately explain the decisional process.”); *Craig*, 429 U.S. at 211-12 (Stevens, J., concurring) (“There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”); see also Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339, 2340 (2006) (discussing Justice Stevens’s approach to equal protection interpretation).

162. But see *Gutter v. Bollinger*, 539 U.S. 306, 344 (2003) (concluding the University of Michigan’s race-conscious admissions policy satisfies strict scrutiny because it took several individualized factors, including race, into account).

163. But see *Romer v. Evans*, 517 U.S. 620, 626-36 (1996) (holding a state constitutional amendment did not satisfy rational basis review because the only credible motive for the amendment was animus toward homosexuals and bisexuals).

164. See Owen Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFFAIRS* 107, 127 (1976) (arguing that equal protection proscribes legally entrenched socioeconomic castes under a “group-disadvantaging principle” or “antisubjugation” principle). See generally Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. REV.* 1003 (1986) (advocating an anti-subordination principle in which laws and classifications that perpetuate subordination of particular groups are highly suspect, even when they are facially neutral); Rogers M. Smith, *Equal Protection Remedies: The Errors of Liberal Ways and Means*, 1 *J. POL. PHIL.* 185 (1993) (endorsing a principle similar to Cass Sunstein’s “anti-caste principle”); Cass Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410 (1994) (arguing for a harmonization of both equality and liberty through an “anti-caste principle” against ingrainning socioeconomic differences into systemic social disadvantages).

165. See generally Paul Brest, *The Supreme Court 1975 Term, Foreword: In Defense of the Anti-discrimination Principle*, 90 *HARV. L. REV.* 1 (1976) [hereinafter Brest, *In Defense of the Anti-Discrimination Principle*] (defining the “antidiscrimination principle” as a model in which preferences are granted to traditionally disadvantaged minorities to rectify past discrimination); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970) (exploring whether and to what extent

suspect classifications raise a presumption that their use—by favoring or subordinating one class over another—violates equality. The focus of this principle is on neutrality—any use is suspect no matter the motive or purpose in employing the classification.<sup>166</sup> In *Washington v. Davis*, for example, the Court did not care that the remedial purpose was to redress the effects of past discrimination.<sup>167</sup> What mattered was only the present use of the classification. This approach eschews appeal to one of the historical purposes of enacting the Fourteenth Amendment—viz., the elimination of the effects of slavery.

Another interpretive principle to animate equal protection doctrine, one that Owen Fiss has championed for years, is the anti-subordination principle.<sup>168</sup> This principle begins with a healthy nod to the historical purposes of the Fourteenth Amendment and sees its role as eliminating the use of race and other classifications where their use achieves or furthers the creation and maintenance of a subordinated class of persons.<sup>169</sup> The goal of equal protection is to embody an ethical view against caste.<sup>170</sup> If the effects of a practice are that racial subordination is furthered, then the practice violates the Equal Protection Clause—no matter the presence or absence of invidious motive.<sup>171</sup> But if the effects of a practice employing a racial classification are to remedy historical injustices and to provide for future equality, then the anti-subordination purpose of the practice is sufficient to meet the requirements of equal protection.<sup>172</sup>

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the political branches' motives are when making classifications tending to lead to discriminatory results).

166. Requiring a specific showing of discriminatory intent has been a high bar to a plaintiff challenging a discriminatory practice. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (holding that employer's hiring preference for former veterans did not show discriminatory intent even though it resulted in far fewer women getting hired); *Village of Arlington Heights v. Metro. Dev. Hous. Corp.*, 429 U.S. 252, 265 (1977) (holding that racially discriminatory intent is necessary to prove a violation of the Equal Protection Clause); *Washington v. Davis*, 426 U.S. 229, 252 (1976) (holding a racially neutral employment test is constitutional despite a disproportionately adverse effect on African-American job applicants). See generally David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 937 (1989).

167. 426 U.S. at 247-48.

168. See Owen Fiss, *Another Equality (Social Groups and the Equal Protection Clause)*, 2 ISSUES IN LEGAL SCHOLARSHIP 1, 3 (2004) (expanding on the anti-subordination principle and arguing that the Court should focus on socio-economically disadvantaged groups).

169. *Id.* at 3.

170. *Id.* at 4.

171. *Id.* at 11.

172. See *id.* at 7 (arguing that antistatutory principle would uphold affirmative action policies while antidiscrimination principle would not).

*Griggs v. Duke Power Co.* is a case that employs this kind of interpretation.<sup>173</sup> *Hills v. Gautreaux*<sup>174</sup> is another exemplary case where this principle is used to counteract the devastating effects of ghettoization—a form of racial subordination—on black residents of housing developments on the south side of Chicago.<sup>175</sup> Though even now Fiss would see the anti-subordination principle underlying some of the Court's approaches to equal protection, it seems fair to say that with its opinion in *Adarand Constructors, Inc. v. Peña*, the Court squarely came down on the side of the supposed neutrality of anti-discrimination.<sup>176</sup>

One mechanism by which the Court manages its own judicial vision is by maintaining a so-called “neutrality” test. Judicial doctrine, as it has developed in the Fourteenth Amendment context, requires that a court refuse to look beyond the purported facial neutrality of a practice, and thus makes invisible much that would otherwise be visible as forms of structural racial or sexual subordination.<sup>177</sup> Indeed, the Civil Rights injunction to create a “colorblind” society relying heavily on the Fourteenth Amendment has undergone a metamorphosis into a strict scrutiny test that views any use of “racial classifications” as suspect—no matter the remedial purpose—in the name of “colorblindness.”

The question the Court resolved in *Adarand* was whether supposed “benign” racial conscious remedial programs are subject to the Court's “strict scrutiny” analysis.<sup>178</sup> The answer was yes. Justice O'Connor relied on her earlier statement that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>179</sup> With this opinion, we have an intersection of three different optical metaphors—colorblindness, “smoking out”

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173. 401 U.S. 424, 436 (1971).

174. 425 U.S. 284 (1976).

175. *See id.* at 296-97 (determining that HUD's funding of racially discriminatory housing policies by the Chicago Housing Authority necessitated granting appropriate relief); *see also* OWEN FISS, *A WAY OUT IX-X* (2003) (arguing that inner-city ghettos are systems of social subordination stemming from governmental policies).

176. 515 U.S. 200, 238 (1995).

177. There are ample examples of discretionary blindness in the Equal Protection context. *See, e.g.,* *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 257 (1978) (refusing to see the systemic gender bias in state hiring practices that give preference to veterans).

178. 515 U.S. 200, 230 (1995); *see* *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500-01 (1989) (holding that “generalized assertions” of past racial discrimination do not justify racial quotas when awarding public contracts).

179. *J.A. Croson Co.*, 488 U.S. at 493.

(e.g., making it appear, making it visible from where it was hidden),<sup>180</sup> and scrutiny (looking from close proximity perhaps, or at least paying particular attention).

Although *Adarand* raises a number of questions to be critically pursued, it is not this essay's purpose to engage in doctrinal analysis of strict scrutiny, or the Fourteenth Amendment, or even the suspect overruling of *Metro Broadcasting, Inc. v. FCC*.<sup>181</sup> What is central to our purpose here is how the Court makes explicit that what is at stake in these cases is not how to interpret the Fourteenth Amendment—not a debate over whether the Fourteenth Amendment is properly understood according to anti-classification or anti-subordination principles, though these are no doubt implicated—but how the Court will *see* claims of racial discrimination. In holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny,”<sup>182</sup> the Court holds that it will only *look* in the most exacting way at the differences that exist between purposes and practices employing racial classifications. It will look to see whether or not the classification serves a compelling state interest and is narrowly tailored to achieve that purpose.

In determining to look closely, ironically, the Court maintains a considerable amount of blindness. That is, it determines not to look and see structural subordination and attempted remedies in a favorable light unless the harm is so clearly visible, and the remedy so clearly connected, that even the “legally blind” can see. On remand in *Adarand*, even by looking through the narrow scope of strict scrutiny, Judge Carlos Lucero is able to see the compelling interest, and see that it is sufficiently tailored to achieve the purpose of remedying harms caused by racial and sexual subordination in the granting of government contracts, though it was certainly no small visual task.<sup>183</sup>

Current judicial practice is that of selective blindness in adjudicating Fourteenth Amendment claims involving racial classifications, and that practice is (perhaps) guided by the

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180. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997).

181. 497 U.S. 547, 600-01 (1990) (holding that the FCC's minority preference policies were constitutional because they advanced legitimate congressional objectives).

182. *Adarand*, 515 U.S. at 227.

183. See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1157 (10th Cir. 2000) (holding Federal program designed to promote hiring of “socially and economically disadvantaged individuals” meets strict scrutiny), *cert. granted*, 532 U.S. 941 (2001), *dismissed as improvidently granted*, 534 U.S. 103 (2001).

“antidiscrimination principle.”<sup>184</sup> Even after the Court’s recent decision in *Grutter v. Bollinger*, which affirmed the diversity rationale Justice Powell first enunciated in *University of California v. Bakke*, judicial reasoning still relies on the antidiscrimination principle that all racial classifications are suspect.<sup>185</sup> As we have seen, employing this principle requires a certain amount of purposeful blindness, for it refuses to examine and to differentiate classifications designed to accomplish invidious purposes (e.g., racial subordination) from classifications designed to accomplish remedial goals (e.g., affirmative action).

This view takes its lead from Justice Harlan’s statement in dissent in *Plessy*, that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>186</sup> In her dissent in the other Michigan affirmative action case, *Gratz*, Justice Ginsburg argues that when a racial classification “denies a benefit, causes harm, or imposes a burden,” then “[i]n that sense, the Constitution is color blind.”<sup>187</sup> Justice Ginsburg continues, however, to note that “the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”<sup>188</sup>

Under current Supreme Court jurisprudence, the majority is unpersuaded by this color conscious reasoning. The justification for this willful blindness, as provided by dissents in *Grutter* and elsewhere, might be glossed as follows: not only has the use of race in the past produced invidious results, but its continuing use in the future is highly suspect because of the risk of stigmatization of blacks, the risk of discrimination against whites, and the general harm to society due to inconsistent classification principles; we would be better served to treat all cases equally (treat likes alike) so that no racial classifications are thus allowed.<sup>189</sup>

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184. See, e.g., *Adarand*, 515 U.S. at 204, 236 (reasoning that classifications based on race are harmful to society as a whole, no matter the motivations behind them); Brest, *In Defense of the Antidiscrimination Principle*, *supra* note 165, at 21 (citing an array of cases that uphold the constitutional principle of “color-blindness” and arguing that benign racial classifications should be suspect but not necessarily subjected to strict scrutiny).

185. *Grutter v. Bollinger*, 539 U.S. 306, 323-24 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1976)).

186. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

187. *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting).

188. *Id.*

189. See *Grutter*, 539 U.S. at 370 (Thomas, J., dissenting) (“What the *Equal Protection Clause* forbids, but the Court today allows, is the use of [merit-based] standards hand-in-hand with racial discrimination”); *Adarand*, 515 U.S. at 230 (locating the injury itself in the classification, not its effects or the presence of invidious purpose); see also SCHUCK, *supra* note 155, at 175-77 (criticizing the continued use of racial classifications in law to remedy past use of those same classifications because the very



This way of thinking has reached its zenith in the Court's most recent school case involving the use of racial classification.<sup>190</sup> The school districts in both Seattle and Louisville employed racial classifications in making some decisions to assign some students to a particular school.<sup>191</sup> One purpose of using race can be described as an attempt to maintain racial diversity among the students in each school. Employing strict scrutiny, the Court per Chief Justice Roberts concluded that such "benign" use of racial classifications is unconstitutional.<sup>192</sup> Rejecting entirely the beneficial goals of using race in the school context, Chief Justice Roberts concludes: "Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools."<sup>193</sup> The new constitutional vision is one that is blind to any differences noted by Justice Ginsburg in dissent in *Gratz*, and Justice Breyer in dissent in the Seattle school case, between invidious uses of race and beneficial uses.<sup>194</sup>

The irony in this position, as Justice Stevens notes in dissent in the Seattle school case, is that it calls to mind another kind of blindness. It calls to mind Anatole France's statement that "the majestic equality of the law forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."<sup>195</sup>

Justice Breyer, writing for four dissenters, highlights the fundamental difference between using "race-conscious criteria to achieve positive race-related goals," and using race-conscious criteria

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existence of such "benign" classifications often weakens elements of the group they aim to serve). *But see* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 19 (1991) ("To argue that one did not *really* consider the race of an African-American is to concede that there was an identification of Blackness.") (emphasis in original).

190. Chief Justice Roberts reasoned:

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2757 (2007) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

191. *Id.* at 2746.

192. *Id.* at 2764-65.

193. *Id.* at 2760.

194. Justice Thomas, writing in concurrence, claims that he is "quite comfortable" with "the notion of a color-blind Constitution." *Id.* at 2782 (Thomas, J., concurring).

195. *Id.* at 2798 (Stevens, J., dissenting).

designed to stigmatize and subordinate.<sup>196</sup> Justice Breyer relies on an anti-subordination theory of equal protection, arguing that the positive use of race-conscious criteria in the school context authorized by *Swann v. Charlotte-Mecklenburg*,<sup>197</sup> “is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion.”<sup>198</sup> For Breyer, context matters, and under our Constitution, one cannot simply refuse to look at differences between the use of race to subordinate and the use of race to build-up by claiming to be colorblind. Vision matters, and how we employ our vision will determine what we see under our Constitution.

Despite the now much-discussed problem of defining groups and their membership criteria for purposes of such programs as affirmative action, social structures were quite effective in producing systemic racial subordination. And that effectiveness was greatly enhanced by the purposeful blindness of the *Plessy* court.<sup>199</sup> It is thus not entirely clear that the willful blindness of procedural constraint embodied in the notion of “colorblindness,” is so much the *indirection* of judicial insight through legal procedure as it is the *misdirection* of the judicial gaze.<sup>200</sup>

To recapitulate, the issue as I have framed it is *not* one primarily of interpretation.<sup>201</sup> It is not primarily a matter of the relations among text, meaning and reader. Rather, the central issue is the way in which the Court employs relative states of vision—a visual employment that points to institutional practices and institutional roles—to attend to some matters but not others.

196. *Id.* at 2811-12 (Breyer, J., dissenting) (relying on *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

197. 402 U.S. 1 (1971).

198. *Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2814.

199. The words providing the blindfold bear repeating here:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

200. This point is especially relevant when we consider Reva Siegel's compelling argument that structures of subordination undergo what she calls “preservation-through-transformation” with the change of legal rules. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

201. Of course, “framing” is itself a visual metaphor too, and complicates relations of inside and outside, raising questions about the nature of margins. JACQUES DERRIDA, *Tympan*, in MARGINS OF PHILOSOPHY ix-xxix (Alan Bass trans., 1982) (1972).

There is, however, a lurking issue of the way in which the willingness to look is tied to a more comprehensive theory. As we have seen, judicial vision is guided in the equal protection context particularly by an initial decision to employ mediated scrutiny, as well as a decision over what principle to recognize in order to animate the equal protection imperative. In this context, however, further unstated “theories” also play a guiding role. In equal protection cases different uses of the concepts “persons” and “individuals” in the Court’s analysis of equal protection are grounded in deeper assumptions of liberal political theory.

In *Shelley v. Kramer*<sup>202</sup> the Court employed a particular abstraction that “[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*. The rights established are personal rights.”<sup>203</sup> Justice Scalia takes up this abstraction of the “individual” in his concurrence in *Adarand* to claim “[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual . . . .”<sup>204</sup> And in her majority opinion in *Adarand*, Justice O’Connor underscored the point that the Constitution “protect[s] *persons*, not *groups*.”<sup>205</sup> She then contrasts the idea of equal protection as a *personal* right with the idea that group classifications “have long [been] recognized as ‘in most circumstances irrelevant and therefore prohibited.’”<sup>206</sup> In *Parents Involved in Community Schools V. Seattle School District No. 1*,<sup>207</sup> Chief Justice Roberts takes up the refrain that the Equal Protection Clause protects persons, not groups, adding that this principle derives from *Brown*<sup>208</sup> itself. The principle entails that there is no constitutional toehold for claims of equal protection on behalf of identity groups or claims made in virtue of a person’s group identity.

The talk of individuals in abstraction is guided by a particular political and philosophical theory. To talk about persons as if their situations and contexts can be stripped away is to be guided by a

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202. 334 U.S. 1 (1948).

203. *Id.* at 22 (emphasis added).

204. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added).

205. *Adarand*, 515 U.S. at 227 (O’Connor, J.).

206. *Id.* (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (upholding a curfew applicable only to persons of Japanese ancestry).

207. 127 S. Ct. 2738 (2007).

208. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

broadly liberal political theory that does not give priority to the communal aspects of social life over the liberty interests of the individual abstracted from the community.<sup>209</sup> That theory claims that selves are somehow prior to their “classifications”—prior to their commitments and situations as embedded in social practices and in relation to other persons.<sup>210</sup> The guiding function of this theory focuses the Court’s sight in such a way that they are unable to look and see the differences that protecting persons in virtue of their group membership might make. There is no problem in being guided by philosophical theories of this nature, and indeed, at some level such guidance may be unavoidable. What such theory does, however, is guide ways of seeing such that some matters become matters of concern for the Court, and other matters are of a kind invisible to the Court’s attention.<sup>211</sup> Groups are invisible to equal protection under the Roberts Court’s approach. Because the Roberts Court is also colorblind, the future of equal protection law will have to develop under a more narrowly constrained constitutional vision.

### C. *Blinding Justice*

There are other ways that Justitia may be blinded other than blindfolding herself. Among the friezes that adorn the facades of the Yale Law School buildings, one such frieze, on the north side, features Justice and her paired scales. But rather than being blindfolded, Justice’s eyes are being poked by a court jester, a fool. This is no doubt a humorous take on the idea of justice blinded—for here, Justice is indeed being blinded by someone else, and by a fool no less.<sup>212</sup> Though playing the fool allows for alternate meanings as

209. The father of modern liberal theory is of course JOHN STUART MILL, *ON LIBERTY* (1859).

210. *E.g.*, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). Critics of strong individualism include 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* (1985); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). For an effective defense of the priority of the individual over society, see WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1991).

211. I find Iris Young’s emphasis on asking “*whom* we are discussing when we compare people’s situation with regard to any or all . . . targets of equality,” a good example of thinking in terms of the group rather than the individual. Iris Marion Young, *Equality of Whom? Social Groups and Judgments of Injustice*, 9 J. POL. PHIL. 1, 1 (2001). She argues that “Structural *inequality* . . . consists in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits.” *Id.* at 15; see AMY GUTMANN, *IDENTITY IN DEMOCRACY* 1-8 (2003) (discussing role of identity groups within a democratic society).

212. The fool’s blinding of justice itself has a history. For example, Albrecht Dürer illustrates Justitia being blindfolded by a fool for Sebastian Brandt’s *Ship of Fools* (1494). Curtis & Resnik, *supra* note 128, at 1740.

well. What Justice is able to see depends on others, and when those others choose to blind Justice to particular claims of justice, the result may be a fool's jape.

Here the issue is institutional capacity and, for federal courts, institutional dependency on congressional control. The kind of control over federal court jurisdiction that Congress exercises leads to much stronger control over what Justitia may see than state courts face. Moreover, what a court is allowed to see depends on other forms of restraint, such as constitutional rules of justiciability. Notions such as concreteness and causation as requirements for standing have the effect of constraining the kinds of claims to which Justitia may attend.<sup>213</sup>

As should be clear by now, Justitia's vision is constrained or blinded in many ways. For example, many rules exist to constrain the evidence a jury, as surrogate for Justitia, may consider. This form of selective blindness sometimes produces strange consequences. For example, under *California v. Brown*,<sup>214</sup> a jury can be instructed during penalty phase of a trial not to be swayed by sympathy or sentiment for the defendant, but during the same trial scene, under *Payne v. Tennessee*,<sup>215</sup> a jury may be swayed by the same emotions on behalf of the victim's family. The message to Justice: do not have emotionally colored sight in one case, but it is okay to see with emotion in another. The issue here is not the inconsistency with which the surrogates for Justice are able to see or are blinded, but the very fact of the selectivity of sight. See this evidence, but not that. See with impassioned eyes here, but not there.<sup>216</sup>

With regard to the federal courts, Congress may play a similar role when exercising its power over jurisdiction. Although many examples abound of Congress's exercise of its power over federal jurisdiction, a couple of quick examples should suffice to illustrate the ways in which an external body such as Congress can blind Justice. The Antiterrorism and Effective Death Penalty Act of 1996<sup>217</sup> ("AEDPA") may be one example of blinding Justice as a consequence

213. See, e.g., *Allen v. Wright*, 468 U.S. 737, 765 (1984) (denying standing to plaintiffs seeking IRS denial of tax-exempt status to private schools that discriminated on the basis of race).

214. 479 U.S. 538, 542 (1987).

215. 501 U.S. 808, 826-27 (1991) (holding that choosing to permit the admission of victim impact evidence and prosecutorial argument erects no *per se* bar).

216. For discussion of the role of emotion in law, see generally MARTHA NUSSBAUM, *HIDING FROM HUMANITY: SHAME, DISGUST AND THE LAW* 5-12 (2004); MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 53-78 (1995) [hereinafter NUSSBAUM, *POETIC JUSTICE*].

217. Pub. L. No. 104-132, 110 Stat. 1214.

of motivations that may have little to do with criminal justice considerations, and more to do with pursuing a vision of state sovereignty and limiting federal judicial power.<sup>218</sup> AEDPA has the effect of limiting the habeas claims a federal court may review,<sup>219</sup> effectively eliminating many habeas petitions at the district court level, and even more, by narrowly restraining the limitation period during which a habeas petition may be filed, effectively reducing the number of claims any federal court hears.<sup>220</sup> Leaving aside any substantive criticism of AEDPA, the point is simply to call attention to the ways in which Congress is a central actor in constraining Justitia's vision by removing or altering federal court jurisdiction.

Another example of how the issue over the Court's vision leads to blindness is the battle between Congress and the courts over determinate sentencing.<sup>221</sup> In an attempt to minimize sentencing disparity in different jurisdictions, determinate sentencing is designed to unify the factors to be considered when sentencing and

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218. A project that the Supreme Court has been a partner in furthering. *See, e.g., Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that States retain immunity from suits in their own courts beyond congressional power under Article I); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (protecting state's sovereign immunity from suit as a limit on congressional power).

219. A petitioner must first obtain a Certificate of Appealability ("COA") from either the district court or the appellate court before an appeal from the denial of habeas relief will be heard. 28 U.S.C. § 2253(c) (2006). In order to receive a COA, a claimant must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a judge must find it at least debatable whether the petition for habeas corpus states a proper denial of a constitutional right).

220. The Roberts Court has taken an active approach to narrowing its habeas jurisdiction by holding that federal appeals filing deadlines are jurisdictional. *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609, 611-12 (7th Cir. 1962) and *Thompson v. INS*, 375 U.S. 384 (1964) (*per curiam*) to the degree they purport to authorize exceptions to the jurisdictional rule).

221. Congress delegated to the Sentencing Commission the task of developing determinate Sentencing Guidelines, which were to be binding on judges. 18 U.S.C. § 3553(b)(1) (2006). *See generally* *Mistretta v. United States*, 488 U.S. 361 (1989) (legitimizing the power of Congress to delegate guidelines to the courts under the separation of powers doctrine). The Supreme Court established a constitutional basis for discretionary sentencing through a series of cases focusing on the Sixth Amendment implications of judicial fact-finding. Under this new jurisprudence, sentencing guidelines will continue to serve an important advisory role. *See United States v. Booker*, 543 U.S. 220, 250-59 (2005) (holding Federal Sentencing Guidelines are not mandatory); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (holding that the judge may only impose a penalty greater than the maximum penalty based on a finding of fact by the jury or fact admitted by the defendant under the Sixth Amendment); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (finding that the Sixth Amendment right to jury trial is violated when a sitting judge determines the presence of aggravating factors required for imposition of a death sentence); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any penalty increased beyond a statutory minimum must be submitted to a jury and proven beyond a reasonable doubt).

the weight those factors may be given. The goal is to provide a more uniform way in which courts attend to sentencing of criminal defendants.

More than eliminating disparity, however, this project has spilled over into broader objectives seeking to constrain judicial vision to pre-determined factors to which a judge may look when imposing sentence.<sup>222</sup> The result was a controversial constrained judicial position. In holding that a sentence nonetheless imposed within a properly calculated Sentencing Guidelines range is presumptively reasonable, the Court per Justice Breyer has confirmed the importance that those guidelines play in providing uniformity and constraint in federal sentencing.<sup>223</sup> Whatever the ultimate merits of such efforts, which as a result of the Supreme Court's decision in *United States v. Booker*<sup>224</sup> have been in flux, we can see that federal courts are not merely blinded by their position in employing the metaphoric judicial balance; rather, their vision is also directed by other institutional actors.

Legislative jurisdiction stripping is a further way other institutional bodies direct judicial attention. For example, recent congressional legislation establishing military commissions include provisions stripping federal courts of jurisdiction over claims brought under habeas corpus for detainees designated as "enemy combatants."<sup>225</sup> This effort is perhaps most significant for its larger separation-of-powers issues involving judicial review of unilateral executive actions. Here again, Congress is exercising power over judicial vision through its power to control federal court jurisdiction. If this control over federal jurisdiction is deemed valid, federal courts will not be able to

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222. Perhaps the most flagrant example is the Feeney Amendment to the Protect Act, which narrowed judicial discretion to depart downward from guideline sentence ranges, changed the standard of appellate review of sentencing departures from abuse of discretion to *de novo*, and temporally prohibited the Sentencing Commission from promulgating new downward departure grounds. Protect Act, Pub. L. No. 10821, § 401, 117 Stat. 650, 667-76 (2003); see *Booker*, 543 U.S. at 245 (granting sentencing discretion back to the federal courts and nullifying the Feeney Amendment).

223. See *Rita v. United States*, 127 S. Ct. 2456, 2467 (2007) (holding that a presumption that a lower court sentence is reasonable does not violate the Sixth Amendment).

224. 543 U.S. 220 (2005).

225. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636 (2006) (precluding any court, justice, or judge from hearing a habeas petition filed by or on behalf of an alien designated as an enemy combatant). The Supreme Court is set to review during its October 2007 Term whether Congress validly stripped federal courts of habeas jurisdiction over petitions filed by foreign citizens detained indefinitely at Guantanamo Bay Cuba. *Boumediene v. Bush* (06-1195) and *Al Odah v. U.S.* (06-1196).

attend to claims that the executive has acted unconstitutionally in holding detainees indefinitely without charges or trial.<sup>226</sup> Congress has adopted a particular view of the proper distribution of judicial oversight over executive action, thereby constraining the power of judicial review.

If, as it seems to be the case, some form of blindness or visual constraint is an ineliminable part of judicial practice, then the guiding theory by which judicial vision is directed in practice should be among our most important critical concerns. Though, we might do well in thinking about the ideal of judicial blindness, to heed carefully Judge Cardozo's advice: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>227</sup>

On the one hand, such blindness can be a product of professionalization and institutional necessity. No wise Solomon or Dworkinian Hercules sits able to discern the ultimate resolution in justice, and hence judges are constrained by the norms of their profession, lest the arbitrariness of King Rex rule. Procedural blindness assures a particular kind of fidelity to law itself—one that depends on the rule of law and something like Lon Fuller's elements of "morality that makes law possible."<sup>228</sup>

Here the problem to be faced is not one of constraining particular judicial decisions, but in properly focusing the courts on the matters to which they are institutionally best able to attend. Altering federal court jurisdiction is one way of directing judicial sight. Other ways depend on a much more broadly encompassing political debate over the role of courts in a democratic society. We can approach the institutional constraint by also focusing on the values to which we most want judges to adhere. For example, commitments to values such as integrity and consistency play a role in decisions over how much sight judges should have and what matters to which they should attend.<sup>229</sup>

On the other hand, the choice among states of vision or relative blindness is a purposeful judicial choice. Judges are human too, and hence they have positionally dependent perspectives on the world. What they are able to see is frequently a function of what they are

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226. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (using statutory construction to avoid a potentially unconstitutional suspension of habeas corpus under the Detainee Treatment Act).

227. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

228. LON FULLER, *THE MORALITY OF LAW* 33-94 (1969).

229. See generally DWORKIN, *LAW'S EMPIRE*, *supra* note 31 (valuing integrity as central to a judge's role).



willing and able to *look and see*.<sup>230</sup> And what they are willing to look and see is further dependent on other background conditions that include, the broader constitutional culture, and even more broadly, what Wittgenstein calls forms of life.<sup>231</sup> Constitutional culture can be understood to encompass the broader set of legal actors in society, including persons and citizens whose lives are shaped through the law.<sup>232</sup> This culture can give rise to expectations concerning institutional behavior and judicial review in a number of contexts. For example, in requiring administrative agencies to provide reasoned explanations for their decisions and to give adequate consideration to all arguments by concerned parties, components of the “hard look” doctrine, courts have adopted a level of scrutiny designed to ensure reasoned decisions by agencies.<sup>233</sup> Actions by one institutional actor are thereby constrained by the exercise of a particular visual stance by another.

The place for critical intervention here is thus not on the discretionary function of judicial interpretation on which so much critical attention is focused. A different set of questions focus on the role of judicial practice. Do judges see their role as protecting minority rights, for instance, or are they motivated by the appearance

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230. For example, a panel of the Tenth Circuit was not willing in *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004), to hear the claims of victims and survivors of the 1921 massacre of black residents of the Greenwood neighborhood of Tulsa, Oklahoma. *See id.* at 1211-14 (giving background of the massacre and ensuing legal battle). The panel opinion claims not to be able to look past the prudential need to let unredressed claims lie because of a statute of limitations. *See id.* at 1219-20 (stating that while exceptional circumstances may justify a tolling of the statute of limitations, the circumstances have sufficiently dissipated requiring enforcement of the statute of limitations). The dissent on denial of rehearing en banc would have required the court to look closely at the merits of the claims, rather than have the eyes of justice shut one more time to the victims of the massacre of over two hundred blacks by white Tulsans aided by state actors. *See id.* at 1159 (Lucero, J., dissenting) (believing that the case “compellingly” presents a “question of exceptional importance” for a rehearing en banc). For an important history of the riot, see generally SCOTT ELLSWORTH, *DEATH IN PROMISED LAND: THE TULSA RACE RIOT OF 1921* (1982).

231. I do not intend for this claim merely to repeat the concerns of legal realism—viz., to ask either what idiosyncratic facts motivate judicial decision-making or what sociological and institutional considerations constrain judges. Brian Leiter, *Is There an “American” Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367, 375 (1997). Although, at the level of the individual judge acting as a person, the judge’s own way of seeing plays a role, too, in shaping the landscape of legal vision.

232. *See* Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (identifying constitutional culture as a specific subset of culture that encompasses extrajudicial beliefs about the Constitution).

233. *See, e.g.,* *Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (reviewing regulatory decision by the National Highway Traffic Safety Administration and requiring more evidence to support the decision disregarding the safety benefits of automatic seatbelts).

of neutrality?<sup>234</sup> Do judges see abstracted individuals or particularized persons? Is it better to have more process to ensure fairness in criminal justice or do criminal investigation and prosecution issues weigh more heavily? Are they motivated to see the law from the broadest level of generality—to be Dworkin’s Hercules—or are they motivated by a concern to pay attention to the particular claims in concrete settings despite having no view of the whole of law? In answering these and other questions, different rank orderings of fundamental values—the kind frequently cited as needing to be balanced, such as liberty values and security values—will produce different views of the issues a court sees.<sup>235</sup>

### III. JUDGING AS A WAY OF SEEING

The blindness trope on the one hand calls attention to the self—and other—imposed constraints on Justice by making visible particular matters as matters of concern and by making visible particular aspects of selected matters of concern. There is, however, a tendency in legal theory to concentrate critical inquiry on the moment when a judge decides a case—a moment that occurs after claims, issues and particular aspects have been made visible. Although Justitia stands for more than the judicial decision, representing most generally the virtue of justice itself, the fact that representations of “Justice” blindfolded with paired scales frequently adorn court buildings indicates the strong public identification of justice with judicial decision.

Within academic circles, the debate over a theory of law, since the publication of H.L.A. Hart’s *The Concept of Law*, has largely been concerned with the issue of the relation between law and morality.<sup>236</sup> But within this debate, a substantial amount of effort has been expended in approaching *that* issue by way of a theory of adjudication. Such theories, then, are able to connect with broader concerns in legal theory that have been appropriated by way of “legal schools.” Legal schools, largely in the “legal realist” tradition, such as Critical Legal Studies and Critical Race Theory, are concerned very

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234. Roberto Gargarella, *Group Rights, Judicial Review, and “Personal Motives,”* ISSUES IN LEGAL SCHOLARSHIP, THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY art. 3 (2002), <http://www.bepress.com/ils/iss2/art3/>.

235. See generally Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002) (discussing the Court’s special institutional role in protecting liberty while balancing legitimate security interests).

236. HART, *supra* note 29, at vii; see COLEMAN, *supra* note 111, at 1 (defending a version of inclusive legal positivism).

much with issues of access to, the process of, and the resolution of claims of justice. And so, in an important way, a major preoccupation of legal theory, although at times by indirect approach, has been with judicial decision-making. Bringing the use of judicial vision and blindness to the forefront provides insight into evaluating theories of adjudication.

Dworkin focuses his theory of just adjudication on judicial sight. His is a totalizing approach. His too is a turn to interpretation. The Herculean judge must, in fulfilling the requirements of integrity, seek to provide the best possible interpretation, and render the best possible decision in each case consistent with the whole of law.<sup>237</sup> Employing imagery also developed by Thomas Nagle's conception of a "view from nowhere,"<sup>238</sup> the Herculean judge works outward from the specific question presented by way of concentric circles to ever wider spheres of judicial vision in order to provide the best decision in the case.<sup>239</sup> Hercules is far sighted and broad minded. Hercules is not concerned with the particularities of any individual case in itself, but views each claim of justice as part of a larger web of law to which he owes his fidelity.<sup>240</sup> Dworkin asserts: "Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."<sup>241</sup> Interpretation for Dworkin's judge is never local and particular, but always global and general.

Robin West, by contrast, writes of a need for the "particularizing gaze" of a sympathetic and caring judge, and that "Judges have a special obligation to the particular litigants before them, just as parents have a special obligation to their children."<sup>242</sup> The problem with the image of justice blindfolded, or justice that seeks to follow a

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237. Dworkin writes:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.

DWORKIN, *LAW'S EMPIRE*, *supra* note 31, at 243.

238. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 5 (1986) ("We may think of reality as a set of concentric spheres, progressively revealed as we detach gradually from the contingencies of the self.").

239. See DWORKIN, *LAW'S EMPIRE*, *supra* note 31, at 250 ("His judgments of fit expand out from the immediate case before him in a series of concentric circles.").

240. *Id.* at 244.

241. *Id.* at 245.

242. Robin West, *Justice and Care*, 70 ST. JOHN'S L. REV. 31, 40 (1996).

“plumb line,” or even justice as integrity is that in each case these theories of justice neglect the interpersonal, the compassionate, the nurturing impulse. West describes justice without care as “self-righteous smugness,” and care without justice leads to “animalistic partiality.”<sup>243</sup> Rather than the image of totalizing justice in Dworkin’s Hercules, West provides an image of tempered particularity—a way of seeing the particular claimants, not blinded by the aspirations of larger institutional and social concerns.<sup>244</sup>

Dworkin’s totalizing model of adjudication and West’s particularizing model of adjudication represent two different extremes on a continuum. Though, to be fair, they are certainly unequal extremes. Far more discursive weight falls on Dworkin’s end of the spectrum, which is joined by a plethora of similar theories attempting to make sense of at least a limited historical whole. These are the approaches Roberto Unger calls “[r]ationalizing legal analysis,” which he describes as “a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles.”<sup>245</sup> Dworkin’s model of Herculean constructive interpretation is certainly one version of rationalizing legal analysis.

So too, however, is the pedagogically dominant Langdellian model—viz., the casebook method which is meant to reveal a set of (imperfectly) connected legal policies and principles.<sup>246</sup> West’s call for re-imagining justice as a particularized project requiring the kind of caring gaze modeled, not on blind justice, but on a kind of nurturance that the model of motherhood presents, stands in sharp contrast to these rationalizing analytic tendencies.<sup>247</sup> Particularly as West’s call is directed towards judicial decision-making as a particularized activity, it avoids the institutional fetishizing of the rational reconstructions of law Unger seeks to subvert.<sup>248</sup> Indeed, West’s call for greater emphasis on care and the particular needs of claimants is consistent with Unger’s claim that we need a method of adjudication “that respects the human reality and the practical needs

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243. See *id.* at 36 (describing the relationship between care and justice).

244. See Robin West, *Feminist Justice, at Home and Abroad: Re-Imagining Justice*, 14 YALE J.L. & FEMINISM 333, 333 (“Justice—and more particularly legal justice—is a badly under-theorized topic in jurisprudence . . .”).

245. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 36 (1996).

246. See generally ANTHONY KRONMAN, THE LOST LAWYER 170-74 (1993) (describing Langdellian formalism); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (discussing the development of Langdell’s orthodox legal paradigm).

247. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 19-21 (1988).

248. UNGER, *supra* note 245, at 7.

of the people who come into court without harnessing them to a glittering scheme for the improvement of the law.”<sup>249</sup>

More generally, the model of legal analysis that both Unger and West wish to overcome can be called the “model of rules.” The basic requirement that judicial decision-making be based on following some version of a delineated rule might occupy the largest part of the generic middle-ground between the approaches of Dworkin and West. The model of rules invokes the idea that each decision is compelled by the weight of prior decisions, guided by institutional and principled commitments to values such as integrity, consistency, publicity, protected expectations and the like. Rules are rails on this model, the judge need only look directly behind and directly in front.<sup>250</sup> There is no need to scan the horizon perpendicular to the rails (as Hercules might have to do), because in any domain of law, the question of particular justice has already been determined by the generalized rule of law to be applied. This formalist version of the model of rules leads to the conclusion at the end of a judicial decision that there was no discretion, only an obligation to provide the answer already compelled by the rule.

Even with a healthy dose of skepticism about strict adherence to formalist precepts, the model of rules still dominates much legal imagination. One can take the Dworkinian approach and prefer principles over rules<sup>251</sup> and still largely follow the “model of rules” by thinking that whatever else may guide a judge, she needs a rule, a standard, or a principle to serve as a determinative guide. This guide is modeled on a rule, even if in the end, it provides a greater degree of discretion (e.g., a principle) than does the ideal formalist model.<sup>252</sup> This much, at least, might also be central to the very idea of precedent—viz., that we owe a debt of fidelity to the past just as the

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249. *Id.* at 113.

250. I take this image of rules as rails from Martin Stone, *Focusing the Law: What Legal Interpretation is Not*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 44-49 (Andrei Marmor ed., 1995).

251. See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25 (1967) (criticizing the positivist reliance on rules rather than principles).

252. To be clear, I am not denying that there is a distinction between a rule and a principle. I am merely pointing out the structural and methodological similarity between models of legal analysis that need some form of guide. And generally, there is a frequent added sense of mourning and loss. In recognizing the role of principle, there is a sense of loss of something rigid (like a rail) and complete that will compel a unique response to any inquiry. (Law and legal theory’s “sustaining loss” is a topic for another essay, however).

future must hold faith to our present with past, present and future all mutually bound by the model of rules.<sup>253</sup>

The model of rules is not without serious problems, even apart from its lack of institutional imagination as Unger urges. The very notion that such rules can operate as rails to guide and constrain judicial decision making is highly problematic. We have already examined the game of “gotcha” that seems to plague postmodern thought. So when faced with indeterminacy in rule following, we can either adopt a position that requires us to accept some form of deeply-embedded skepticism with regard to judicial decision-making, or, we could avoid that skepticism, while retaining the model of rules, by using social science research to explain what is really going on—viz., rules are being followed, but not simply the ones to which judicial decisions self-consciously follow.

In contrast to both of these approaches, Wittgenstein’s famous comments on rule-following provide a way of clarifying why the model of rules is inadequate, while showing the way to a “solution” to the supposed problem of indeterminacy that would follow from skepticism about the model of rules.<sup>254</sup> Framing this issue as one of instruction, Wittgenstein asks how we teach a student to continue a series by adding two each time (e.g., 92, 94, 96 . . .). We might first, for example, go through each member of the set from two to ninety-eight with the pupil. There is a pedagogical limit, however. We can only show the student how the series goes so far, and thereafter the student must continue it on her own. What do we say when the child counts by adding two correctly until she reaches 100 whereupon she continues the series with 104, 108, 112? We will want to say that this is certainly wrong—that the child has failed to understand the rule. But the child can retort that she was merely following the rule to add two until 100 and add four thereafter, and hence was following *that* rule perfectly well. The lesson we learn by extrapolating from this simple example is that for any way of continuing the series there is some articulable rule that purportedly can guide one’s response.

The indeterminacy that seems built into the very idea of following a rule is disconcerting to any theory that depends on the determinacy

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253. Take, for example, Kronman’s sense of precedent of “mutual indebtedness” and obligations between past and present where “[w]e are indebted to those who came before us, for it is through their efforts that the world of culture we inhabit now exists . . . [and] they are indebted to us, for it is only through our efforts that their achievements can be saved from ruin.” Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1067 (1990).

254. See generally WITTGENSTEIN AND LEGAL THEORY (Dennis Patterson ed., 1992) (laying out the general theories surrounding Wittgenstein’s view of rule-following).

of rules. Saul Kripke, for example, notoriously explicates this “rule following paradox” in terms of the function of “+.”<sup>255</sup> The question for Kripke is to ask how, despite the countless times we have performed the function “+” in the past, is one to respond when confronted by the next instantiation of “plus.” The skeptical problem is that any deviation from the standard usage, say the “quus” function, could be made to accord with some rule. If no rule can determine its future use, and all ways of continuing the series could be the product of following some rule that covers both the initial situation as well as the deviation, then it would appear that we must be skeptical both about rule-following as well as our capacity at instruction. In the adjudicatory arena, if every decision could be made to accord with some rule of law, some precedent, then the very idea of following precedent would seem to be undermined. The mantra to “treat likes alike” would serve as no determinative guide at all, because to say “now go on to continue the series *like this*” would resolve little about how one is to proceed. It may be that we must simply make a decision, one not already determined by what has gone before.

It would appear that with no ability to determine an action by a rule, one cannot be accused of failing to follow a rule. Thus, the very idea of following a rule loses all force of determination. Wittgenstein states the problem in the following way:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord or conflict here.<sup>256</sup>

But Wittgenstein does not leave us in a paradox. Notice that Wittgenstein’s critique leads to skepticism only if we accept the rails as our model of instruction. The formalist calls for determinacy, and when none is found, the postmodern theorist is tempted to declare that all is possible. The formalist is at a dead-end, calling for what cannot be had.

But so too, even Unger admits, is the Critical theorist, whose critique “tempts the radical indeterminist into an intellectual and political desert, and abandons him there alone, disoriented, disarmed, and, at last, corrupted-by powerlessness.”<sup>257</sup> Note, however, that the formalist and the Critical theorist represent two different scenes in the same play. The former wants something she

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255. SAUL KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 7 (1982).

256. WITTGENSTEIN, *supra* note 120, at 81e, § 201.

257. UNGER, *supra* note 245, at 121.

cannot have, and the latter mourns the loss of what could have been. Both accept that legal analysis begins with one's relation to the model of rules.

By contrast, Wittgenstein shows us that we are led necessarily to skepticism only if we accept the premise that determinacy is only to be found from the model of rules.<sup>258</sup> If we abandon the model in both its positive and negative scenes in the play of legal theory, then we need not be abandoned in a desert of our own making, but are rather liberated by a new way of seeing our relation to our practices and the rules that guide them. Wittgenstein's lesson is for us to recognize that our instructions on how to continue the series are never fully bounded, never fully capable of determining all future instantiations of the rule.<sup>259</sup>

Concerning our practices involving rule following, Wittgenstein makes the following observation: "When I obey a rule, I do not choose. I obey the rule *blindly*."<sup>260</sup> Obeying the rule blindly would seem, on the surface, to capture precisely the image Justice blindfolded means to convey: the formal structure of legal rules leaves no room for bias or discretion, forcing the "hand of justice" into blind obedience to the rule. Rules would indeed be our model, for there is no need for fine discernment or perspicuous vision since we can obey *blindly*. But obedience for Wittgenstein is not the ideal it appears to be. Following a rule is what one does unreflectively—as part of an ordinary practice for Wittgenstein. When one moves a bishop diagonally in chess, for example, one follows the rule blindly. In the normal course of engaging in activities and using language, there is no room for doubt or indecision about how to proceed—one simply acts, in a sense, blindly. Thus, obedience need not be a cognitively reflective activity.<sup>261</sup>

Stanley Fish uses the example of the Baltimore Orioles pitcher Dennis Martinez whose guiding rule was to "[t]hrow strikes and keep

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258. WITTGENSTEIN, *supra* note 120, at 81e, § 201.

259. To say that one continues a series in a particular way because one has interpreted the rule does not resolve the problem of rule-following—it merely restates the problem. On this question of interpretation, Scott Hershovitz argues that Wittgenstein has nothing to offer, and indeed he is correct. He is wrong, however, to suggest that because Wittgenstein fails to contribute to a discussion of rule interpretation, he fails to contribute to the general problem of rule skepticism in legal theory. Scott Hershovitz, *Wittgenstein on Rules: The Phantom Menace*, 22 OXFORD J. OF LEG. STUD. 619, 639-40 (2002).

260. WITTGENSTEIN, *supra* note 120, at 85e, § 219.

261. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 41 (1975) (arguing that we have reasons to act on the basis of rules whose justifications we do not ourselves examine).



‘em off the bases.’<sup>262</sup> Fish argues that there is no relation between the critically unreflective practice of doing what one does when one plays baseball and any theory about what one ought to do. One simply unreflectively acts. Likewise, Fish argues, the judge is engaged in doing what she already does, and thus identifies the crucial issues without reflection.<sup>263</sup> The very act of obeying blindly for both Wittgenstein and Fish is meant to mark the lack of rational reflection when conducting our ordinary practices and activities. This normal “blindness” does not mean that we cannot or should not reflect on our practices, but merely that we normally do not. Furthermore, as in the case of chess, reflection would actually undermine the activity, since if we were to move the pieces in ways other than those specified by the rule, in an important sense, we would no longer be playing chess.<sup>264</sup>

But Fish’s application of Wittgenstein’s thought here to the practice of judging is suspect. We do not need to be self-conscious of ordinary rules—the rules of games for instance—when we know how to play. Fish’s sleight-of-hand is to analogize constitutive rules of a game with guiding rules of a necessarily critically reflective practice—that of judging.

Appearances notwithstanding, Wittgenstein’s response to the skeptic—that we obey rules blindly—does *not* vindicate Justice blinded in a critically unreflective position. Judicial decision-making is not in its nature the sort of practice that should lead to unreflective, blind adherence to practice or rule. There are blindnesses, no doubt, and mechanical exercises analogous to “throwing strikes.” But justice, or the practice of judging, is not something that in itself can always be “followed blindly” because as Wittgenstein demonstrates, rules are not fully determinate guides. Just as no practice is everywhere circumscribed by rules (e.g., how high to throw the ball in tennis when serving), the practice of judging is not everywhere circumscribed. It is a practice always open to the

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262. FISH, *supra* note 94, at 372.

263. Fish, *Fish v. Fiss in DOING WHAT COMES NATURALLY*, *supra* note 94, at 122-23. Fish imagines the command to a new judge that here are the rules, now go to work.

The new judge would soon find that she was unable to read the rules without already having a working knowledge of the practices that were supposed to order, or, to put it somewhat more paradoxically, she would find that she could read the rules that are supposed to tell her what to do only when she already knew what to do.

*Id.*

264. *Cf.* WITTGENSTEIN, *supra* note 120, at 81e, § 201 (referring to the need for actions, or chess moves, to accord with rules, not for the moves to be determined by the rule alone).

possibility of interruption and hesitancy that comes with noticing a new aspect—of seeing a legal problem in an entirely new and different light. Thus, Fish is guilty of generalizing from one kind of ordinary case—viz., the automatic imposition of some kinds of procedural rules, for instance—to the whole of judicial practice.

Indeterminacy of meaning in the law is not the only critical concern, and certainly does not derive from Wittgenstein's discussion of rules.<sup>265</sup> Accepting the proposition that we do not always engage in our practices reflectively does not lead to quietism. But these observations do suggest that the difficulty with vision is that we are ordinarily blind to how it operates. Having a vision of the Constitution as a whole influences actual practice and judicial decisions. Having a view of particular facts and structures, while remaining blind to others, is also a factor in legal practice and decision. Each of these ways of employing vision are different, but both point beyond to problems of legal interpretation.

Becoming aware that interpretation and indeterminacy are not the whole game does not tell us what to do about our entrenched ways of seeing. Changes do occur, practices and interpretations are never fixed and final, but change is not always and only determined by interpretation. Imagination plays a role too—the ability to see in different ways than before.<sup>266</sup> Imagination was central to bringing about through words the creation of a new nation, the bringing into being of "We the People." Change occurs through projecting new visions onto the future. Because judges must adopt a view of the law as a limited whole or in part, imagination engages legal thinking as another form of vision.<sup>267</sup> Vision is therefore not merely a form of

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265. For approaches that have tried to derive strong indeterminacy positions from Wittgenstein, see Tushnet, *Following the Rules Laid Down*, *supra* note 47, at 781. See also Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391-92 (1982) ("It would obviously be nice to believe that *my* Constitution is the true one and, therefore, that my opponent's versions are fraudulent, but that is precisely the belief that becomes steadily harder to maintain. They are simply *different* Constitutions. There are as many plausible readings for the United States Constitution as there are versions of *Hamlet* . . ."); Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 623-24 (1987) (surveying the claim that it is impossible to achieve a determinate view of rules).

266. See NUSSBAUM, POETIC JUSTICE, *supra* note 216, at 1-12 (describing the literary imagination's relationship to justice); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1480 (1995) (advocating the measured use of imagination to supplement judicial reasoning); see also SHELDON WOLIN, POLITICS AND VISION (1960). Wolin argues that "political philosophy constitutes a form of 'seeing' political phenomena," *id.* at 17, which employs imagination as a key means to lessen "the gap between the possibilities grasped through political imagination and the actualities of political existence." *Id.* at 20.

267. See JAMES BOYD WHITE, THE LEGAL IMAGINATION 207-11 (1985) (describing the lawyer's role as a translation of imagination through the power of language).

legal constraint, as are rules. Vision also embodies a constructive possibility of progress and transformation, an ability to attend to new matters of concern.

As Part IV will argue, legal meanings and rules are never settled absolutely and finally, but are always open to forming part of new ways of seeing in the future. Because the future will take shape through the particular matters to which constitutional culture attends, judging is, more than anything, a way of seeing. Thus, vision and blindness will be the unavoidable conversational foils.<sup>268</sup> It is the tension between vision and blindness, not only the tension between interpretation and text, upon which we should critically focus.<sup>269</sup>

#### IV. VISION AND CONSTITUTIONAL TRANSFORMATIONS

When scholars and judges write about having a view of the law, adopting a particular vision of the law, shutting the court's eyes to problems, or adopting a different vision, the visual metaphor is frequently deployed at moments of proposed legal change. First, either through adopting various levels of scrutiny, or seeing or failing to see social structural impacts claimed through constitutional provisions, vision matters to law. Second, interpretation occurs always within a field of vision. Judges cannot interpret what they cannot see. Legal change and transformation can no doubt occur through the simple adoption of a new interpretation and new application of settled principles to new situations. Transformation, however, also requires adopting a new vision of a domain of law. The transformation the Court's economic substantive due process analysis that occurred in cases such as *West Coast Hotel v. Parrish*<sup>270</sup> and *Carolene Products*<sup>271</sup> is on the one hand a complex story, and on the other hand, at least schematically, quite simple.

The Court adopted a new way of looking at its institutional role in limiting government economic regulations. The mistake of *Lochner* was in its vision of what liberty in the due process clause requires, not

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268. This is not to deny the importance of speech or text. See generally Heidi Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

269. This point is by way of contrast to Stanley Fish:

In both law and literature it is ways of *reading*, inseparable from the fact of the institution itself, and not rules or special kinds of texts that validate and justify the process of rational interpretation, whether it leads to the rendering of a clear-cut legal decision or to the demonstration that what is valuable about a poem is its resolute refusal to decide.

FISH, *supra* note 94, at 138 (emphasis added).

270. 300 U.S. 379 (1937).

271. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

in failing interpretively to understand the meaning of the due process text. The New Deal constitutional moment was the product of a gestalt shift changing the way the Court sees, how liberty in the due process clause fits within social practices, and how due process is connected to other constitutional values. The “switch in time,” importantly involved a “switch in vision.”

As a way of explaining the “switch in time,” Bruce Ackerman’s theory of constitutional moments also relies implicitly on the notion of vision.<sup>272</sup> Beginning from a background state of normal politics, Ackerman’s account of constitutional transformations requires a series of incremental institutional changes that give rise to a moment of profound legal and political change.<sup>273</sup> He schematizes these institutional changes as requiring triggering elections, repeated returns to the people for further authorization, elections that confirm the legal transformation, and the capitulation by the opposition to change.<sup>274</sup> Periods of normal politics may be punctuated by the occasional period of constitutional politics in which “We the People” express our political will to bring about constitutional transformation.<sup>275</sup> The process of constitutional change may lead to a constitutional moment in which a constitutional transformation occurs, such as the transformation wrought by the New Deal. After such a transformation, “We the People” recede back into normal politics having changed the constitutional landscape through unconventional processes.<sup>276</sup> What guides the constitutional transformation, however, is a new vision of some aspect of constitutional culture. Resistance to the change also occurs as a rejection of the new vision in favor of the old. Although the debate may touch on issues of constitutional interpretation, the real issue in a constitutional moment is the adoption of a new way of seeing our constitutional commitments and our institutional practices, guided by new values and priorities.

Mark Tushnet develops an alternative theoretical framework, which is concerned with what he calls “constitutional orders,” in terms of vision as well. Constitutional orders are relatively stable institutional arrangements through which the people make principled decisions.<sup>277</sup> Tushnet identifies the New Deal-Great Society

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272. ACKERMAN, TRANSFORMATIONS, *supra* note 10, at 273.

273. *Id.* at 23-75.

274. *See id.* at 25-31, 306-11 (identifying the 1934 election as a triggering election).

275. *Id.* at 309-11.

276. *Id.*

277. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1-2 (2003).

constitutional order as having dominated political institutions and as having provided guiding principles for setting policy and making political as well as judicial decisions.<sup>278</sup> Constitutional orders, though enduring, are not never-ending. We are living through the change to a new constitutional order, which Tushnet argues began to emerge in 1980 with the election of Ronald Reagan as president.<sup>279</sup> Within the judiciary, the new order has manifested itself in a bevy of new constitutional decisions that have altered fundamental institutional arrangements relating to federalism, the Commerce Clause, the role of state sovereign immunity, the enforcement of civil rights legislation, as well as more specific doctrinal areas such as takings and free speech.<sup>280</sup> Tushnet describes the new order generally in terms of vision: “The new order’s vision of justice . . . is one in which government provides the structure for individuals to advance their own visions of justice.”<sup>281</sup> The idea of a constitutional order is related to Ackerman’s theory of constitutional moments, in that both theories depend on the ways that constitutional actors are guided by over-arching visions of constitutional order and change. Again, these visions may be described in terms of differing constitutional interpretations, but they sweep far more broadly by articulating different ways of seeing institutional arrangements, individual obligations, and the role of rights. Hence, a change in constitutional order flows from a change in vision.

Jack Balkin and Sanford Levinson recognize the central role that vision plays in constitutional order and change. They write: “The fight over the Constitution is a fight over contrasting political visions, a fight over contrasting narratives of American history, and a fight over contrasting conceptions of We the People and its deepest commitments.”<sup>282</sup> According to Balkin and Levinson, the fight over constitutional vision occurs through the process of partisan entrenchment.<sup>283</sup> When political partisans gain control over the political branches, they are able to extend temporally their control through lifetime appointments to the federal judiciary. Partisan entrenchment may be nothing new, as Federalist attempts to entrench their power in the judiciary leading up to *Marbury v.*

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278. *Id.* at 8-9.

279. *See id.* (adding that the new order has been consolidated since the election of the Republican majority House and Senate in 1994).

280. *Id.* at 33-70.

281. *Id.* at 2.

282. Balkin & Levinson, *supra* note 9, at 1094.

283. *Id.* at 1066.

*Madison*<sup>284</sup> amply illustrate. When judges share an overall vision of constitutional order, they are able to enshrine that vision through enduring constitutional decisions. Thus, partisan political change can be leveraged into constitutional transformation. They argue that this is precisely what has occurred more recently under the Rehnquist revolution, and continues apace after *Bush v. Gore*.<sup>285</sup> Even more critically, they argue that a partisan court, acting outside its authority, decided the 2000 election in order to ensure that the political branches would sustain the new constitutional vision and further entrench that vision through additional judicial appointments.<sup>286</sup> Partisan entrenchment is a theory designed to understand what Balkin and Levinson identify as the current constitutional revolution.<sup>287</sup>

Although different constitutional interpretations are at stake, what guides the revolution is a new vision of constitutional order and constitutional culture. Thus, I agree that the “point is that it is contending visions, rather than judicial craft, that should be at the heart of the contemporary debate.”<sup>288</sup> At the level of contending visions, what is required is that each side provide a narrative articulation of their constitutional vision. From within a particular way of seeing, for example the Equal Protection Clause, there is little indeterminacy of meaning requiring interpretation. It is only when one disagrees with the animating vision that one typically raises an objection to a particular interpretation. Thus, the mechanisms of transforming constitutional visions are far more important than the mechanics of interpretation that operate from within a particular vision.

Given that it is possible to see the same text *as* the same text, yet have an entirely different constitutional vision, it is important to understand the nature of such changes in vision. In order to see how changes of vision are possible while at the same time the putative object of vision remains the same, it will be useful to first confront a particular epistemological puzzle involving vision, the contexts in which this puzzle arises, and a solution provided through application of Ludwig Wittgenstein’s philosophical thought.

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284. 5 U.S. (1 Cranch) 137 (1803) (establishing principle of judicial review).

285. 531 U.S. 98 (2000); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1435 (2001) .

286. Balkin & Levinson, *supra* note 9, at 1097-99.

287. *Id.* at 1066-70.

288. *Id.* at 1094.

### A. *The Molyneux Problem*

Vision has preoccupied Western thought at least since Rene Descartes hypothesized that the central epistemological problem in philosophy is how the mind's eye processes retinal images as representations of entities exterior to the mind.<sup>289</sup> Although for Descartes, the mind turns its vision inward to a reflection of ideas, for later British epistemologists the mind becomes a mirror of nature, and the philosophical problem becomes how to account for the relationship between seeing and that which is seen.<sup>290</sup> On this model, however, the suspicion developed that the eye does not reflect a reality independent of the mind, but that what the eye sees—the visual field—is a reflection of a visual and linguistic construction of the world, not a representation of the world somehow rendered independent. For instance, Michel Foucault writing about the construction of new modes of scientific knowledge which depended on the development of new ways of seeing suggests that the “eye becomes the depositary and source of clarity; it has the power to bring a truth to light that it receives only to the extent that it has brought it to light.”<sup>291</sup> Moreover, the centralization of vision as the dominant means of knowledge, when connected to official methods of exercising political power, leads to refined methods of surveillance for which the panopticon is the much-discussed paradigm.<sup>292</sup> Foucault's work demonstrates how vision begins as a pure problem of epistemology only to become a means not only of knowledge, but of social and political control.

289. Rene Descartes, *Meditations on First Philosophy*, in PHILOSOPHICAL ESSAYS AND CORRESPONDENCE 132-33 (Roger Ariew ed., Hackett Publishing Co. 2000) (1641).

290. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 45 (1980). See generally IAN HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? (1975) (examining problems in metaphysics and epistemology that have been influenced by theories about language).

291. MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION xiii (Alan Sheridan trans., 1973) (1963); see also MICHEL FOUCAULT, MADNESS AND CIVILIZATION 250 (Richard Howard trans., 1965) (1961) (“The science of mental disease, as it would develop in the asylum, would always be only of the order of observation and classification.”).

292. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200-09 (Alan Sheridan trans., 1977) (1975) (analyzing the historical and political significance of Jeremy Bentham's 1791 treatise on the model prison). The issue of visibility and control is not confined to the penological context, but is central to understanding many current issues including those of privacy. See JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 1-12 (2000) (discussing the analog between the Clinton impeachment and the erosion of privacy in American culture); Daniel Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1398 (2001) (discussing the use of panoptic and Kafkaesque metaphors in understanding the threats to privacy caused by database collection of private information).

Seeing the world in one particular way is not fully determined by an objective reality accurately represented through sight. In the most general way, one has a world-view that is likely shared by many and shaped through collective experience. In a particular way, one sees the world from a particular place that is likely shared by no other and shaped through individual experience. Visual experience is the organizing force to human knowledge and understanding according to enlightenment philosophy and must synthesize publicly shared conceptions with individual experience. Because vision played a central role in enlightenment thought, tellingly, puzzles over blindness were given considerable attention, suggesting that vision is organized by its relation to blindness.

Consider, for example, the famous Molyneux problem contemplated by John Locke in his *Essay Concerning Human Understanding*—"Suppose a man born blind, and now adult, and taught by his touch to distinguish between a Cube, and a Sphere . . . be made to see," could he by sight be made to distinguish the two?<sup>293</sup> Locke's friend William Molyneux raised this question in a letter and Locke's answer was that such a person would not be able to distinguish the two.<sup>294</sup>

This question seems to have been the question of the time, and was raised, with varying answers, by Bishop Berkeley, Leibniz, and Diderot, among others.<sup>295</sup> Locke's answer to the puzzle is no. The man born blind who learned to feel the differences between shapes such as spheres and cubes would not be able to identify a cube or a sphere by sight.<sup>296</sup> Knowledge one has about the world through touch isolated from vision does not provide one with visual knowledge without first having to coordinate between vision and touch.

More than 300 years later, Oliver Sacks had occasion to confirm Locke's answer empirically in his interaction with Virgil, a man whose sight was restored as a mature adult.<sup>297</sup> After a surgical procedure to remove the cataracts from Virgil's eyes, he was thrust into a bewildering world of visual detail—most of which he was completely

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293. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 145-49 (Peter Nidditch eds., Oxford Univ. Press 1975) (1689).

294. *Id.* at 146.

295. See, e.g., George Berkeley, *An Essay towards a New Theory of Vision*, in PHILOSOPHICAL WORKS 47-48 (M. R. Ayers ed., J. M. Dent & Sons Ltd. 1975) (1709) (arguing that the blind man would be able to distinguish the cube because he knows that the cube is composed of square surfaces); G. W. LEIBNIZ, NEW ESSAYS ON HUMAN UNDERSTANDING 255-56 (Jonathan Bennett & Peter Remnant eds., 1981); Denis Diderot, *Lettre Sur Les Aveugles* (Robert Niklaus ed., 1970).

296. LOCKE, *supra* note 293, at 146.

297. Oliver Sacks, *To See and Not See*, in ANTHROPOLOGIST ON MARS 108 (1995).



unable to process.<sup>298</sup> Though he could “see” he remained cognitively blind, an agnosic unable to connect the images he could “see” with the lived and tactile experiences of his world as a blind man.<sup>299</sup> An agnosic is a person, like Vigil, who is able to “see,” but unable to understand what he is seeing and unable to integrate visual experience with other sensations.<sup>300</sup>

With regard to the figure of Justitia, an agnosic condition would mean that once the blindfold is lifted from the blind goddess’s eyes, she would not be able to tell the difference between the sphere and cube by sight without the aid of touch. More generally, the judge, the legal practitioner, or the legal theorist who had an experience of a phenomenon blind, would, when sight is restored, not be able to integrate the new visual experience with the pre-visual experience of the same or similar phenomenon. What does the prospect of agnosia mean for legal theory and practice? Perhaps no such condition exists for the metaphorical blindness that Justitia experiences.

On the one hand, there is a world of difference between constrained vision of the kind that courts have and physical blindness of the Molyneux hypothetical. On the other hand, the more vision is directed and constrained in the legal context the more opportunities there are for slippages between how courts understand the field of legal vision and how persons without such visual handicaps would understand the same field. To the extent that what courts and legal practitioners see needs to map onto what the broader legal and constitutional culture of a society sees, there will remain the prospect for a form of agnosia. As this Article has already canvassed, cases of structural claims like those of *McCleskey* present precisely this kind of gap between what can be seen through a particular legal lens, and what the broader legal culture can see.<sup>301</sup>

Thus, it is plausible to conclude that the agnosic condition creates problems for the imaginative exercise of legal theories that rely on vision and blindness. At some level legal practitioners must learn to integrate blind experiences into visual experiences. And when it comes to the practice of judging, there must be some suitable geographic mapping of the decision reached through blinded and constrained sight and our broader view of justice in society gained through all the coordinated senses that are involved when attending to an issue or problem. Stephen Carter diagnoses the problem with

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298. *Id.* at 115.

299. *Id.* at 121.

300. *Id.* at 140-41.

301. Bright, *supra* note 142 and accompanying text.

cases like *McCleskey* as a problem of agnosia. He writes, “the problem is not an inability to remember the past, but an incapacity to integrate the present.”<sup>302</sup>

Such geographic mapping of law’s field of vision, however, is not the same thing as translating meanings over time. In order to account for fidelity to the text over time, Lawrence Lessig, for example, has proposed that we understand the process of constitutional interpretation as a process of translation.<sup>303</sup> The problem here goes beyond translating a fixed text into different cultural “languages” during different times and circumstances;<sup>304</sup> rather, the problem here is the broader one of coming to see the relevance, or a meaning, or the comparative significance of a constitutional provision in light of other ways of seeing the law. Each change in vision requires integration with those parts of one’s vision that remain unchanged. Rather than fidelity to a text, the problem is retaining a kind of fidelity to consistency and coherence between old and new meanings (old and new ways of seeing).

What needs explaining is how transformations in legal thought can occur in ways that do not depend upon developing a new interpretation, and do not depend on exploiting the Constitution’s open texture or law’s indeterminacy. The new problem is that when we do enact a transformation, it is not clear that we will readily be able to integrate the new vision with the unchanged aspects of the old. The possibility of a radical transformation—suddenly seeing what previously went unseen—entails the need to integrate what is now seen within the background way of seeing before.

The solution to this as well as the Molyneux problem is found in the recognition that blindness is not a state to overcome, by merely removing the veil, but is a necessary concomitant to a “way of seeing” embedded in social practice. When we undergo a revolution in a way of seeing, the revolution takes some time to pervade all aspects of constitutional culture. For example, the incorporation of the Bill of Rights through due process was brought about by a transformation in how we view constitutional rights and liberties as limiting the

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302. Carter, *supra* note 140, at 441.

303. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1173 (1993) (“The translator’s task is always to determine how to change one text into another text, while preserving the original text’s meaning.”). See generally Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (explaining how new readings of the Constitution may maintain fidelity with past understandings of the document’s meaning and purpose).

304. See Sanford Levinson, *Translation: Who Needs It?*, 65 FORDHAM L. REV. 1457, 1466-67 (1997) (rejecting importance of “translation”).

behavior of states.<sup>305</sup> The process of incorporation, however, spanned over thirty years.<sup>306</sup> In the meantime, a new way of seeing must live alongside other ways of understanding that themselves may operate like an undercurrent, waiting for the chance to dominate the primary flow.

At the level of constitutional politics, it may be the case that there is no reconciling the one way of seeing with the other, and that the transformation from one to the other will produce a strong version of the Molyneux problem, a difficulty in reconciling a constitutional vision with beliefs and practices developed by a different constitutional vision. For many, the problem with cases like *Roe v. Wade*<sup>307</sup> has been an inability to integrate the decision within their broader worldview. Not all attempts to settle significant constitutional and moral questions are entirely successful in resolving competing worldviews, and thus full transformation is not always possible.

Turning again to Ludwig Wittgenstein's thought, it is important to recognize that social practice is conducted on the basis of negotiating between different states of vision and blindness in order to construct contingently settled, holistically coherent visions.

### B. Wittgenstein on Changing Visions

The problems of translation, the problems with moving between two entirely different ways of seeing, are important because much political and constitutional argument is about contending visions. Sometimes, it appears that legal practitioners are completely unable to see the other side, and are therefore unable to imagine what life is like from within the other vision. Justice Brown notoriously writes for the Court in *Plessy* in response to the claim of racial stigmatization by separate facilities, "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put

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305. The transformation traces its roots to cases like *Gitlow v. New York*. See 268 U.S. 652, 630 (1925) (holding under due process that States must comply with Free Speech Clause); see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (applying Sixth Amendment right to jury trial to states); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying Fourth Amendment right to be free from unreasonable searches and seizures to states); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding states cannot convict on basis of testimony obtained from torture).

306. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (incorporating Eighth Amendment prohibition on cruel and unusual punishment); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (incorporating First Amendment right to association).

307. See 410 U.S. 113, 168 (1973) (striking down state law criminalizing abortion as violating fundamental liberty).

that construction upon it.”<sup>308</sup> Justice Brown is unable to see what Justice Harlan sees, that “[t]here is no caste here. Our constitution is color-blind . . . .”<sup>309</sup> There is, however, another kind of blindness that can occur even for one capable of seeing an object, but incapable of seeing it in a certain light—what Ludwig Wittgenstein calls aspect blindness.<sup>310</sup> Justice Brown may be aspect blind to the effects and harms of regulating “civil rights solely upon the basis of race.”<sup>311</sup>

Wittgenstein introduces the idea of “seeing an aspect” to call attention to the multivalent ways of seeing what is putatively the “same” object.<sup>312</sup> Consider the rather mundane example of psychologist Joseph Jastrow’s duck/rabbit figure.<sup>313</sup> Viewed in one way the figure is a duck. Viewed in another way, the figure is a rabbit, thereby calling attention to the ability to *see* two very different “things” in one and the same simple figure. Manifestation of what one sees—a duck or a rabbit—occurs in how one describes what one sees. Does one speak of bills, webbed feet, and water, or does one speak of ears, fur, and the forest? It is possible to see only the duck or only the rabbit, and thus be blind to the different aspects under which the figure can be seen.

The puzzle over the ability to see different aspects is that “[t]he expression of a change of aspect is the expression of a new perception and at the same time of the perception’s being

308. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding constitutionality of doctrine of “separate but equal”).

309. *Id.* at 559 (Harlan, J., dissenting).

310. See generally WITTGENSTEIN, *supra* note 120, at 213e. Wittgenstein has been employed in legal theory discussions by others as a source for the indeterminacy thesis, by way of what is known as his rule-following argument. E.g., Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problems of Legal Explanation*, 6 CARDOZO L. REV. 917, 929-31 (1985). Wittgenstein has been invoked in other contexts, not to support indeterminacy, but for his general discussions of rules and language games. See, e.g., Dennis Patterson, *Law’s Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 942-46 (1990) (arguing Wittgenstein is central to modern philosophy’s turn to language). But see Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 102 (2005) (resisting self-consciously the urge to cite to Wittgenstein as a philosophical source for the indeterminacy thesis). Little or no discussion has been devoted to the relevance of Wittgenstein’s discussion of noticing an aspect, nor does this discussion provide grounds for a deeply entrenched indeterminacy thesis. But see Stephen C. Root, *Trade Dress, the “Likelihood of Confusion,” and Wittgenstein’s Discussion of “Seeing As”: The Tangled Landscape of Resemblance*, 30 SETON HALL L. REV. 757 (2000) (applying Wittgenstein’s discussion of seeing as to tests for likelihood of confusion of trade dress).

311. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

312. Wittgenstein writes, “I contemplate a face, and then suddenly notice its likeness to another. I *see* that it has not changed; and yet, I see it differently. I call this experience ‘noticing an aspect.’” WITTGENSTEIN, *supra* note 120, at 193.

313. *Id.* at 194.

unchanged.”<sup>314</sup> This phenomenon of seeing an aspect allows us to speak in terms of “seeing-as.” We see, for example, a criminal defendant as deserving the appropriate due process protections. We see a just society as requiring a proper distribution of goods. We see regular features of our practices and interactions with other persons in a particular light for particular purposes, and we focus on salient features of our visual field as particularly relevant to those practices and purposes.

Recognizing that all seeing can be expressed as a way of “seeing-as” highlights three features of a way of seeing: the background conditions, practices, and assumptions that inform how we see; the actual visual sensation of seeing; and the response to that seeing which is inseparable from the act of seeing itself. This latter feature, radically re-orientes how we understand *seeing* because any act of *seeing* is a kind of *responding*. Thus, for Wittgenstein, action and perception are intimately connected, such that an ability, for example, to see another person in need is bound up with a response (or conscious decision not to respond) to that need.<sup>315</sup>

But if perception is a matter of noticing an aspect, then there is also the open possibility of infelicity in ways of seeing. We can get it wrong, in much the same way as J. L. Austin calls attention to the ever-present possibility of infelicity and misfire in our use of language.<sup>316</sup> What might become a settled habit of seeing things in one way, must be open to the ever-present possibility of what Wittgenstein calls the “dawning of an aspect.” For one who had always seen only the duck in Jastrow’s figure, the sudden recognition that the figure can also be a rabbit is the “dawning of an aspect.” Settled ways of seeing must be open to the possibility of interruption—of seeing in a new light because the nature of seeing is such that new aspects may always dawn and coalesce where before we had seen something only in a single light.

Applying this insight to how we understand legal disagreement, especially at the level of constitutional politics, the goal is to adopt strategies aimed at bringing the other side to adopt one’s vision of the matter.<sup>317</sup> For the task is to put in question how the legal

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314. *Id.* at 196.

315. See, e.g., DAVID COCKBURN, OTHER HUMAN BEINGS xiii (1991) (discussing how there are “radical asymmetries in the attitudes which we take to be appropriate towards ourselves and towards others”).

316. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 16-18 (1962) (comparing, among misfires, “misinvocations” of procedure to “misexecutions”).

317. This involves the ability to shift our attention from what can be seen in the foreground to what is visible in the background. Wittgenstein’s point is that every

practitioner is inclined to see a given case, to approach a legal issue, or to construct a claim in justice.<sup>318</sup> At the level of a particular adjudication, each litigant tries to affect a judge or jury's way of looking at things. At the level of constitutional principle, litigants and academics attempt to shape, in particular, an appellate judge's way of looking at things. And, at the level of policy we all engage in dialogue aimed at changing the way legislators, judges, and fellow citizens look at things.

Ways of seeing can be localized or more expansive. Within a particular legal context and within a particular social practice, adopting a new way of seeing may be nothing more than changing how one rule is interpreted in a relatively contained area of life. However, changing a way of seeing may also be far more expansive, as when we come to adopt a new way of looking at the application of Fourteenth Amendment substantive due process to the states. Cases such as *Brown v. Mississippi*<sup>319</sup> and *Moore v. Dempsey*<sup>320</sup> employed due process to declare a constitutional restraint on the racially unjust processes black criminal defendants faced in some state criminal procedures. These cases and others<sup>321</sup> wrought changes that pervade the legal system and many social and legal practices, enabling particular claims of justice to be heard in court, and signaling a

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foreground is only contingently so, only against a background that is not as yet in question, but is open to the possibility of itself forming part of the foreground as our attention shifts. Transformation and conversion in ways of seeing depend on this shifting visual capacity. See generally WITTGENSTEIN, *supra* note 120. Bruce Ackerman makes a similar point in terms of conversational constraints that limit what claims in justice can be seen by what claims in justice can be said. BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 24-37 (1984).

318. Stability in ways of seeing will exist so long as it does not occur to legal practitioners to call into question background assumptions and blindnesses that focus the way of seeing in a particular way. Conditions, however, may change and new ways of seeing emerge that begin to put those background assumptions into play in a way that may bring about a change in a way of seeing. See, e.g., DWORKIN, *LAW'S EMPIRE*, *supra* note 31, at 89 (discussing changing legal paradigms in patterns of agreement and disagreement when "[s]uddenly what seemed unchallengeable is challenged, a new or even radical interpretation of some important part of legal practice is developed in someone's chambers . . ."); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986) (discussing the "phenomenology of judging" in situation where judges bring background rules into question); Tushnet, *Defending the Indeterminacy Thesis*, *supra* note 84, at 346-47 (noting that within any legal controversy "there are the 'rules in play,' about which lawyers deploy professionally respectable arguments, and the 'background rules'").

319. See 297 U.S. 278 (1936) (holding that convictions based on confessions coerced through torture violate the Due Process Clause).

320. See 261 U.S. 86 (1923) (ruling mob-dominated trials violate the Due Process Clause).

321. See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (holding under due process that in a capital trial, defendants must be given access to counsel).

change in the country's tolerance for racial injustice.<sup>322</sup> These cases wrought a change in vision that profoundly began to change legal practice, as well as made initial steps in the eventual systemic changes undertaken by later civil rights decisions. Although ways of seeing may be more or less localized or pervasive, as a matter of legal theory, the scope of seeing will depend entirely upon the purposes legal practitioners might have and the contingent situations that arise to make possible a new way of seeing. Thus, as legal theory, when we focus on changing ways of seeing, we need not hypothesize a legal Hercules who must attempt to see the whole of legal practice from a privileged position.<sup>323</sup> Ways of seeing can be changed from inside existing practices through the dawning of new aspects.

The open possibility of interrupting a way of seeing things, the existence of a state of never-fully settled practices and meanings, suggests something else important for our discussion here. Legal reasoning cannot always be a matter of deductive inferences from settled doctrine. We do not always decide claims of justice by appeal to what Roberto Unger calls "rationalizing legal analysis," because there is no single, settled meaning doctrinal principles already have.<sup>324</sup> Even when rationalizing legal analysis appears to have settled some area of the law—e.g., Congress's nearly unfettered use of the Commerce Clause to enact legislation affecting interstate commerce—some new turn in legal opinions may revive the specter of the *Lochner*-era's way of seeing,<sup>325</sup> or some other yet to be articulated way of seeing. Thus, even when principles of law appear to be settled, they may in fact only be contingently settled, awaiting some new circumstance, some new will to put into play new arguments.<sup>326</sup> Ordinarily, legal practitioners reason by analogy to

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322. See generally Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (discussing landmark cases of the 1930s which altered the landscape of criminal procedure).

323. See generally RONALD DWORKIN, *SOVEREIGN VIRTUE* (2000); DWORKIN, *LAW'S EMPIRE*, *supra* note 31.

324. UNGER, *supra* note 245, at 34.

325. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding the right to free contract was implicit within the Commerce Clause); see also *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding the Violence Against Women Act of 1994 was unconstitutional as exceeding congressional power under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding federal government had no authority to regulate firearms in school zones).

326. Mark Tushnet describes the indeterminacy thesis as claiming "that legal propositions will be indeterminate when some socially significant group finds it useful to raise legal claims that theretofore seemed frivolous; their arguments will become first professionally respectable and then reasonably powerful as their social or political power increases." Tushnet, *Defending the Indeterminacy Thesis*, *supra* note

existing precedent and existing legal interpretations. Sometimes, however, legal practitioners may seek to bring about a fundamental change in the law having the effect of introducing a new way of seeing to an old area of law. Arguably, *Brown*<sup>327</sup> was such a case for equal protection and *Miranda v. Arizona*<sup>328</sup> for criminal procedure. With new decisions come new visions of constitutional law, and with new visions, a judge or justice can provide new constitutional decisions, contributing to the on-going conversation within constitutional culture.

#### V. CONCLUDING OBSERVATIONS

Looking closely at the role of courts and the practice of judging, we have observed how vision is endemic to the very practice of law. At the end of the Supreme Court's 2006 Term, there is much talk about the shift the Roberts Court is making.<sup>329</sup> From new ways of seeing the importance of colorblindness in school policy, to First Amendment rights, to rights of access to the courts, the Roberts Court is beginning to make manifest its vision of the Constitution. The content of that vision remains obscure, perhaps even to the Roberts Court itself, but what is clear is that substantive constitutional decisions will be determined by that developing vision. We must await further manifestations of what matters of concern will occupy the attention of this new Court.

When we shift the focus from indeterminacy to vision in the law, we see that the jurisprudential problem is not merely the fact that texts, rules, and practices are indeterminate, but that these are all products of the shifting perspectives of vision in the law. Jack Balkin writes that "[n]o doubt legal interpretation begins with the text, but it can hardly end there."<sup>330</sup> Although a narrow conception of interpretation may begin with the text, the broader process of creating meaning in law begins elsewhere. Legal interpretation begins with vision which guides the selection of matters and texts to be interpreted. This is not to say that interpretation is possible without the text, but neither

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84, at 345. *But see* Coleman & Leiter, *supra* note 96, at 568-70 (discussing the concept of semantic skepticism).

327. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

328. *See Miranda v. Arizona*, 384 U.S. 436 (1966) (guaranteeing criminal suspects the right to be informed of their right to counsel).

329. *See, e.g.,* Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (observing that the Roberts Court seems to be moving in a more conservative direction).

330. Balkin, *supra* note 87, at 732.



is it possible without a guiding vision. Regarding the Constitution, the relation between interpretation and vision is central to the process of creating constitutional culture and meaning.

On the need to understand the framers' way of seeing in order to begin to understand the Constitution, Amar writes, "only after we understand their world and their original vision can we begin to assess, in a self-conscious and systematic way, how much of this vision, if any, has survived—or should survive—subsequent constitutional developments."<sup>331</sup> At key moments within broader legal and constitutional culture, we may be "called upon to assess the durability of a constitutional world built up by a generation and more of juridical effort," and decide with Ackerman "whether the old world [is] dead, or worthy of continued preservation."<sup>332</sup>

Having a vision and inhabiting a constitutional world is to inhabit a "normative universe . . . held together by the force of interpretive commitments . . . [to] determine what law means and what law shall be."<sup>333</sup> In so inhabiting, our attention should be drawn first to the geography of that vision and the way in which a vision of the law shapes constitutional culture as well as our shared forms of life. If interpretation always occurs within a vision of the law, then our first questions should be about what we see and what we are able to see. When we see that vision matters in the law, critical attention should be drawn away from its fixation on interpretation and indeterminacy to focus on the prior questions of constitutional vision.

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331. AMAR, *THE BILL OF RIGHTS*, *supra* note 1, at 7-8.

332. ACKERMAN, *TRANSFORMATIONS*, *supra* note 10, at 401.

333. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).